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No. 8119

United States Circuit Court of Appeals

For the Ninth Circuit.

HAYNES STELLITE COMPANY,
a Corporation,

Appellant,

vs.

STOODY COMPANY, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8119

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Southern District of California, Central Division.

Equity No. 690-J

STOODY COMPANY, a Corporation,

Plaintiff,

vs.

HAYNES STELLITE COMPANY, a Corporation,

Defendant. [1*]

NAMES AND ADDRESSES OF ATTORNEYS.

FOR APPELLANT:

Messrs. LYON & LYON, and
HENRY S. RICHMOND,
811 West Seventh Street, Los Angeles, California;

FOR APPELLEES:

Messrs. HAZARD & MILLER,
706 Central Building, Los Angeles, California;
CHARLES C. MONTGOMERY,
810 Title Guarantee Building, Los Angeles, California.

[2]

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*Page-number appearing at the foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To STOODY COMPANY, a corporation: GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, California, thirty (30) days from and after the date this citation bears, pursuant to Order allowing Appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of California, Central Division, wherein Haynes Stellite Company, a corporation is defendant and you are plaintiff, to show cause, if any there be, why the Order rendered against the said Appellant as in said Order allowing Appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable Wm. P. James, Judge of the District Court of the United States, for the Southern District of California, this 13 day of December, A. D., 1935.

WM. P. JAMES,
Judge of the District Court of the United States
for the Southern District of California.

SERVICE of the foregoing Citation by copy acknowledged this 14 day of December, 1935.

STOODY COMPANY,
By HAZARD & MILLER,
FRED H. MILLER,
Its Attorneys.

[Endorsed]: Filed Dec. 16, 1935. [3]

In the United States District Court, Southern District of California, Central Division

In Equity on Letters Patent No. 1,803,875, Issued May 5, 1931

Eq. 690-J.

STOODY COMPANY, a corporation,

Plaintiff,

vs.

HAYNES STELLITE COMPANY, a corporation,

Defendant.

BILL OF COMPLAINT.

To the Honorable Judges of the United States District Court for the Southern District of California, Central Division:

THE PLAINTIFF, STOODY COMPANY, complaining of the herein named defendant, alleges:

1.

That the plaintiff, Stoody Company, is a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal office and principal place of business in the City of Whittier, County of Los Angeles, State of California.

2.

That, upon information and belief, Haynes Stellite Company, defendant herein, is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, having its principal place of business at Kokomo, Indiana, and having a regular and established place of business at 2305 52nd Street, City of Los Angeles, County of Los Angeles, State of California.

[5]

3.

That the defendant has committed, is now committing, and is threatening to continue to commit the acts of infringement complained of therein within the Southern District of California, Central Division, and elsewhere within the United States.

4.

This Honorable Court has jurisdiction of the cause of action herein as the same is a suit in equity arising under the patent laws of the United States and based upon infringement of Letters Patent No. 1,803,875, granted May 5, 1931, to plaintiff, Stoody Company, as the assignee of Winston F. Stoody, Shelley M. Stoody, and Normal W. Cole, for Improvements in Methods of Facing Tools and Resulting Product.

5.

That, as plaintiff is informed and believes, heretofore and prior to the 30th day of January, 1928, Winston F. Stoody, Shelley M. Stoody, and Norman W. Cole, all citizens of the United States, and then residents of the City of Whittier, County of Los Angeles, State of California, were the first, original, and joint inventors or discoverers of a certain new and useful method of facing tools and the resulting product not known or used by others in this country before their invention or discovery thereof and not patented nor described in any printed publication in this or any foreign country before their invention or discovery thereof or more than two years prior to their hereinafter mentioned application for Letters Patent of the United States, and not in public use nor on sale in this country for more than two years prior to the date of their said application for Letters Patent of the United States and which had not been abandoned nor patented

nor caused to be patented by them or their representatives or assigns in [6] any country foreign to the United States on an application filed more than twelve months prior to the filing of their application for Letters Patent of the United States as hereinafter mentioned.

6.

That the said Winston F. Stoody, Shelley M. Stoody, and Normal W. Cole, on or about the 30th day of January, 1928, being then, as aforesaid, the first, original, and joint inventors or discoverers of said improvement in a method of facing tools and resulting product, made application in writing to the Commissioner of Patents for the grant of Letters Patent for said invention and duly filed on January 30, 1928, an application for Letters Patent of the United States, Serial No. 250,069, disclosing, describing, and claiming said invention in accordance with the then existing laws of the United States. That simultaneously with the execution of said application said Winston F. Stoody, Shelley M. Stoody, and Normal W. Cole duly executed and delivered to Stoody Company, the plaintiff herein, a corporation of the State of California, an assignment of the entire right, title and interest in and to said invention on a method of facing tools and resulting products, which assignment contained the request that the Letters Patent to be granted upon said application be issued to the said Stoody Company; that said assignment was duly recorded in the United States Patent Office on or about February 13, 1928.

That the said Winston F. Stoody, Shelley M. Stoody, and Norman W. Cole, and the plaintiff herein, having duly complied in all respects with the conditions and requirements of the United States Statutes in such cases made and provided and after due examination by the Commissioner of Patents as to the novelty,

invention, and utility of said improvement, there were issued to plaintiff, Stoody Company, a California [7] corporation, under date of May 5, 1931, in due compliance with the statutes in such cases made and provided, Letters Patent of the United States No. 1,803,875, whereby there was granted to the plaintiff, Stoody Company, its successors or assigns, for the term of seventeen years from the 5th day of May, 1931, the full and exclusive right of making, using, and vending said invention throughout the United States and the territories thereof as by the original of said Letters Patent or a duly certified copy thereof will more fully appear. Plaintiff hereby makes profert of the original of said Letters Patent or a duly certified copy thereof and of the assignment mentioned herein.

7.

Plaintiff further states that by virtue of the premises aforesaid, it has now become and now is the sole owner of the entire right, title, and interest in and to said Letters Patent and of all rights and privileges granted and secured thereby and is entitled to sue for injunctive relief against any infringement thereof and to recover any profits and/or damages arising out of the infringement of said Letters Patent.

8.

Plaintiff further states that the said invention, as aforesaid, is of great utility and value, that welding rods which can be advantageously employed in carrying out or placing in effect the method of facing tools according to the invention of said Letters Patent have been sold by plaintiff in very large and constantly increasing quantities. That the invention covered by said Letters Patent is generally used by purchasers of plaintiff's welding rods and materials. That plaintiff has expended large sums of money for installing equipment for the manufacture of welding rods

which may be utilized in accordance with the invention of said Letters Patent [8] and has been and now is ready to supply the trade and public with welding rods and materials to be used in practicing the invention of said Letters Patent.

Plaintiff further states that plaintiff has spent large sums of money in advertising said invention and in advertising welding rods that may be advantageously employed in carrying out said invention. That plaintiff has also spent large sums of money in educating the trade in the use of said invention both by printed publication and by sending demonstrators into the fields where the invention is susceptible of being practiced.

9.

Plaintiff further states that the public has generally acquiesced in the usefulness of said improvement and has generally acknowledged and acquiesced in the rights of the plaintiff in respect to said invention and in the validity of said Letters Patent. Plaintiff has granted licenses under said Letters Patent to licensees enabling licensees to practice said invention upon the payment of royalty to the plaintiff and such licenses have been of great value to the plaintiff because of the royalty heretofore paid and which plaintiff expects to be paid in the future.

Plaintiff has also caused applications to be filed applying for foreign Letters Patent, to-wit: in Great Britain and in Canada; and has secured British Letters Patent No. 350,607, sealed September 3, 1931, and Canadian Letters Patent No. 323,762, issued June 28, 1932, upon the same invention; that such foreign Letters Patent are now in full force and effect.

That plaintiff has instituted suit upon said Letters Patent No. 1,803,875, in this Honorable Court, entitled "Stoody Com-

pany vs. Mills Alloys, Inc., and Oscar L. Mills, in Equity [9] No. Y-101-J", which cause of action was referred to Special Master David B. Head for trial upon the merits under a full and complete reference. That the said Special Master has rendered his final report upon such reference to the effect that the claims of the Letters Patent in suit there in issue were valid and infringed as per the copy of the Master's final report attached hereto. That the Master's final report has been approved by The Honorable William P. James over the exceptions of the defendant filed thereto as per the minute order dated June 11, 1935, a copy of which is attached hereto.

That but for the infringement complained of by plaintiff herein as having been committed by the defendant and of a limited number of others, some of whom have already acquiesced in the rights of the plaintiff and in the validity of said Letters Patent, the plaintiff would still be in the undisturbed use and enjoyment of the exclusive privileges secured by said Letters Patent in suit and in receipt of large gains and profits from the same.

10.

That defendant has received actual notice of the Letters Patent in suit and has also received constructive notice by plaintiff's manufacturing and selling welding rods designed to be used in practicing the invention of said Letters Patent bearng the word "patented" and the number "1,803,875".

11.

That plaintiff has purposely withheld instituting the present suit against this defendant and also against a large number of other infringers until plaintiff had first secured an adjudication as to the validity of the Letters Patent in suit by bringing a

test suit against Mills Alloys, Inc., and Oscar L. Mills, it being plaintiff's intention not to bring vexatious litigation against a large number of infringers [10] until the validity of the Letters Patent in suit had been adjudicated good and valid in law.

12.

That prior to the commencement of this suit and since the granting of said Letters Patent the defendant herein named, well knowing the facts as herein set forth, has unlawfully infringed said Letters Patent against the will of the plaintiff and in violation of the plaintiff's rights; has been and now is infringing said Letters Patent within the Central Division of the Southern District of California, and elsewhere in the United States, and is threatening to continue to infringe said Letters Patent by making, using, and selling, and causing to be made, used, and sold within the Southern District of California and elsewhere in the United States welding rods and materials which when used are intended by the defendant to be used in accordance with the invention disclosed, described, and claimed in said Letters Patent; that the defendant herein in selling said welding rods and materials disclosed to and instructed purchasers of the welding rods and materials the manner of using them in accordance with the invention disclosed, described, and claimed in said Letters Patent, constituting a direct and contributory infringement thereof against plaintiff's will and without plaintiff's license or consent and notwithstanding notice given the defendant of said Letters Patent and of the infringement that the said defendant is threatening to continue and to increase such acts of infringement; that defendant is now supplying to its customers materials and welding rods with the intention and instruction that such materials and welding rods shall be used in

such a manner as to infringe upon said Letters Patent No. 1,803,875; that the infringing acts of the defendant have the effect of inducing others to infringe said Letters Patent and that by said infringing acts defendant has wrongfully [11] converted to itself trade and profits which plaintiff would otherwise have received and enjoyed, as to the amount of which plaintiff is uninformed and prays discovery, whereby plaintiff has been caused great and irreparable damage and injury and defendant will, if it is allowed to continue such infringement, further irreparably damage and injure the plaintiff, depreciate or destroy the value of exclusive rights to which the plaintiff is entitled under said Letters Patent, and deprive the plaintiff of the benefit and advantages thereof.

13.

That defendant, prior to the commencement of this suit and since the grant of said Letters Patent, has been manufacturing, using and selling a welding rod known as "Haystellite Composite Rod", consisting of a large number of fragments of tungsten carbide bound together by a metal of materially lower melting point which is softer than tungsten carbide. That such rods were manufactured and sold with the instruction and intention that they be used in such a manner as to infringe upon the Letters Patent in suit.

That recently and prior to the commencement of this suit the defendant has brought out upon the market a new style of rod under the name of "Tube Haystellite" consisting of a mild steel tube filled with fragments of tungsten carbide, which rod is a direct copy of plaintiff's rod as disclosed in the Letters Patent in suit all without the license or consent of Plaintiff and with the intention of more seriously competing with plaintiff's welding

rod business by having a rod of more attractive appearance which would appear more similar to plaintiff's welding rod and [12] which could be sold in greater competition with plaintiff's welding rod constituting a deliberate attempt on the part of the defendant to infringe upon the Letters Patent in suit and to appropriate to itself business that rightfully belongs to the plaintiff.

WHEREFORE, PLAINTIFF PRAYS:

I. For a decree adjudging plaintiff's aforesaid Letters Patent No. 1,803,875, dated May 5, 1931, are good and valid in law and are owned by the plaintiff and have been infringed by the defendant.

II. That the defendant, its directors, officers, associates, attorneys, clerks, servants, workmen, employees, and confederates, and each of them, may be perpetually enjoined and restrained by a writ of injunction issued out of and under the seal of This Honorable Court from directly or indirectly manufacturing, using, and/or selling and/or causing to be manufactured, used, and/or sold, and/or threatening to manufacture, use, and/or sell welding rods made in accordance with the invention and improvement or discovery of said Letters Patent No. 1,803,875, dated May 5, 1931, and/or from supplying to the trade ingredients or supplies from which welding rods embodying said invention can be manufactured, and/or from in any wise infringing upon said Letters Patent and/or contributing to the infringement of said Letters Patent by others and/or conspiring with others to so infringe said Letters Patent in any way whatsoever.

III. That a preliminary injunction be granted to the plaintiff against the defendant to the same purport, tenor, and effect as hereinbefore prayed for in regard to said perpetual injunction. [13]

IV. That the defendant be ordered and decreed to deliver to the plaintiff all of said infringing apparatus which it has in

its possession and/or under its control, and that such apparatus be destroyed and/or that the same be delivered to This Honorable Court to be impounded by This Honorable Court for such final decision as to the Court may seem just and proper.

V. That the defendant may be decreed to account to the plaintiff for all the gains, profits, and advantages realized by said defendant from its willful and unlawful use and practice of the invention in and by said Letters Patent, and in addition to said gains, profits and advantages to be so accounted for, the damages sustained by the plaintiff as a result of said infringement, and that the amount of damages for said infringement of said Letters Patent may, in view of the willful character of the infringement, be increased to the sum not exceeding three times the amount thereof as provided by law.

VI. That a writ of subpoena ad res may issue forthwith out of and under the seal of This Honorable Court directed to the defendant requiring him, by a day certain and under a certain penalty to appear and make full, true, and perfect answer to the bill of complaint herein and to stand to, perform, and abide by such further order, direction and decree, as may be made against them.

VII. That the defendant may be decreed to pay the costs, charges, and disbursements of this suit.

VIII. That the plaintiff may have such other and further relief in the premises as the equity of the case may require, and to the Court may seem meet and just.

STOODY COMPANY,

(Signed) By *WISTON* F. STOODY

FRED H. MILLER,

706 Central Bldg.,

Los Angeles. [14]

State of California,
County of Los Angeles—ss.

WINSTON F. STOODY, being first duly sworn, deposes and says: that he is president of Stoody Company, the plaintiff herein; that he has read the foregoing bill of complaint and knows the contents thereof and that the allegations made therein are true except those matters alleged upon information and belief and as to those matters he believes them to be true, and that the reason this bill of complaint is verified by affiant is that the plaintiff is a corporation.

(Signed) WINSTON F. STOODY

Subscribed and sworn to before me this 17 day of June, 1935.

[Seal] FREDA R. PAULSON

Notary Public in and for the State of California, County of Los Angeles. [15]

METHOD OF FACING TOOLS AND RESULTING PRODUCT

Filed Jan. 30, 1928

Fig. 1

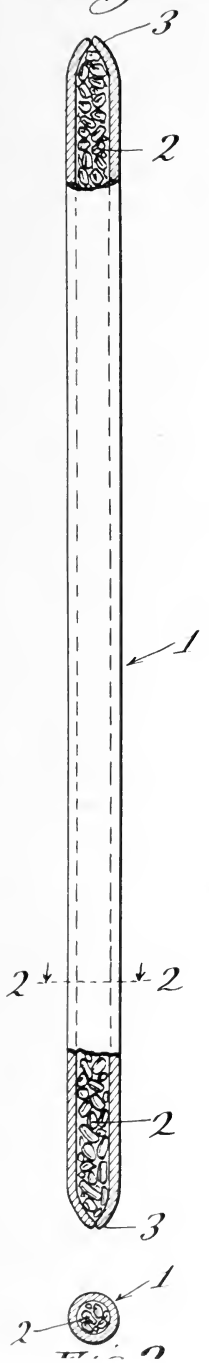


Fig. 3.

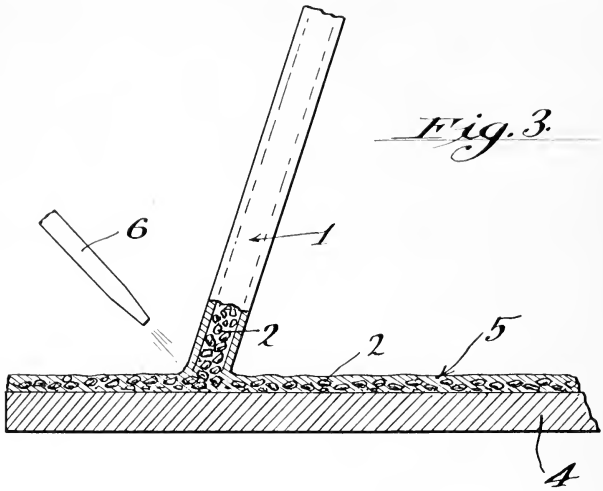


Fig. 4.

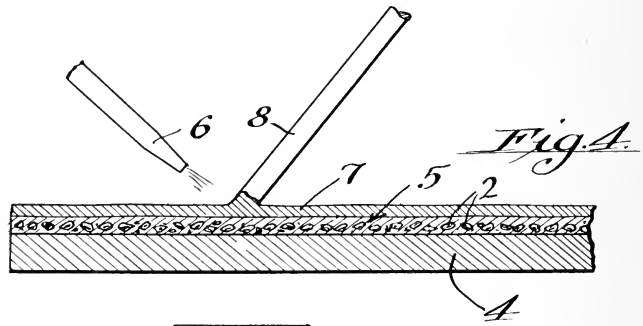
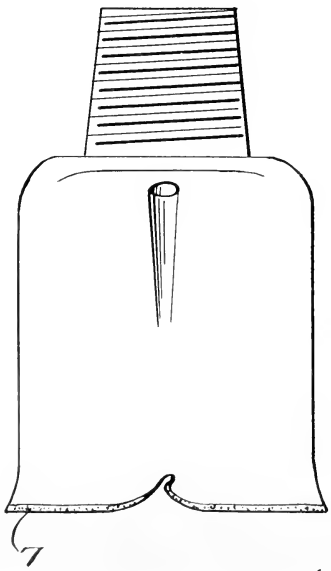


Fig. 5.



Inventors
W. F. Stoody
S. M. Stoody
N. W. Cole
by Hazard and Miller

Patented May 5, 1931

UNITED STATES PATENT OFFICE

WINSTON F. STOODY, SHELLEY M. STOODY, AND NORMAN W. COLE, OF WHITTIER, C
FORNIA, ASSIGNORS TO STOODY COMPANY, OF WHITTIER, CALIFORNIA, A CORP
TION OF CALIFORNIA

METHOD OF FACING TOOLS AND RESULTING PRODUCT

Application filed January 30, 1928. Serial No. 250,698.

Our invention relates to a method of facing tools and resulting product.

It is an object of this invention to face tools used for cutting, drilling or boring, with a layer of metal in which are embedded pieces or particles of an exceedingly tough and hard material of great wear-resisting properties.

Our invention consists in the method and resulting product hereinafter described and claimed.

In the accompanying drawings which form a part of this specification, we have illustrated the means and manner used in our invention, and in which,

Figure 1 is an elevation of a welding rod with parts in section used in our method.

Figure 2 is a cross section taken on the line 2—2 of Figure 1.

Figure 3 shows the depositing of the material of the welding rod on a tool to face the same.

Figure 4 shows the step of depositing the second layer of metal on the first deposited layer on the face of the tool.

Figure 5 shows a fish-tail bit such as used for drilling oil wells, the cutting surfaces of which have been faced with a layer of cutting metal deposited in accordance with our method.

Referring to the drawings, Fig. 1 shows a welding rod used in our method. The same consists of a tubular container 1, made of metal of a comparatively low melting point such as mild steel. The same is filled with pieces or particles 2 of an alloy or element of a considerably higher melting point than the mild steel of which the tube 1 is composed. The tube 1 is preferably pinched together at the ends 3 so as to confine the particles or pieces 2 within the tube. Though any hard and tough alloy of a considerably higher melting point than mild steel may be used in place of the pieces or particles 2, we prefer to use a carbide of tungsten.

for welding rod, Serial No. 250,697, January 30, 1928 now Patent No. 1,75 dated May 6, 1930.

The tool to be faced with a layer of a ting, drilling or boring surface, is s at 4. A layer of metal 5, in which the ticles 2 are embedded, is deposited th by melting the end of the welding rod b suitable means such as an acetylene tor dicated at 6. On the layer 5 shown in F 4, we deposit a top layer 7 by melting a ing rod 8 by means of an acetylene to or the like. The welding rod 8 is a hard steel having a higher melting point tha mild steel 1, in which the particles 2 ar bedded. We prefer to use hard tool such for example, as set forth in U. S. ent No. 1,559,015 dated October 27, 192

The object of using a mild tool steel a tube in the welding rod is to provide a or binder for the particles 2 of the hard which bond or binder is fusible at a perature which will not cause the all form gases or oxidize, which would resu fissures or blow-holes.

The mild tool steel forms a bond weld fused on to the face of the tool. The sk the mild tool steel covering the partic will protect the same when the steel allo fused and deposited on top thereof. I hard tool steel were used as the tube i welding rod, there would be danger o alloy particles being oxidized and for blow-holes which are avoided by using a of mild steel which is of comparatively fusing point.

The resulting cutting or drilling fac the tool is thus provided with an outer and tough layer of tool steel, which, is worn down, exposes the still harder tougher particles and pieces of alloy 2, w form an effective and durable cutting drilling face of the tool.

While we prefer to deposit a second l

pieces of the harder material are im-
led.
arious changes may be made by those
ed in the art without departing from
spirit of our invention as claimed.
'e claim:
A method of facing tools comprising fus-
a layer of metal containing pieces of a
erial having a greater melting point than
metal upon the face of a tool, and fus-
a second layer of a metal on top of the
layer, said second layer having a melting
it considerably higher than said first
r.
A method of facing tools, fusing a layer
mild steel containing particles of an al-
having a considerably higher melting
it than said mild steel upon the face of a
, and fusing a second layer of tool steel
n said first layer.
A method of facing tools comprising
ng a layer of mild steel and containing
es of an alloy comprising tungsten and
on on the face of the tool, and fusing a
nd layer of hard tool steel on said first
r.
A tool having an operating face com-
ing two fused layers, the first layer con-
ing of a metal of comparatively low melt-
point having embedded therein pieces of
alloy of a considerably higher melting
it, and the second layer comprising tool
l.
. The method of facing tools which com-
es first associating together a metal of
tively low melting point and pieces of a
d substance of relatively high melting
nt, supplying heat to the associated mass
cause the metal of low melting point to
t and be deposited on the tool and carry
h it the pieces of hard substance deposit-
them on the tool without materially
nging their identity, causing a fusion to
e place between the metal of low melting
nt and the metal of the tool, and allowing
metal of low melting point to cool and
den about the pieces and thus anchor
m to the tool.
. The method of facing tools which in-
des associating together a metal of rela-
ly low melting point and pieces of a hard
terial of relatively high melting point,
positing the associated mass on a tool by an
-acetylene welding flame, causing a fusion
ake place between the metal of low melt-
point and the metal of the tool, and al-
ing the metal to cool and harden about
hard material to anchor it in place with-
having melted the hard material to any
terial extent.
tool by an oxy-acetylene welding flame, caus-
ing a fusion to take place between the metal of
low melting point and the metal of the tool,
and allowing the metal to cool and harden
about the tungstic material to anchor it
in place without having melted the tungstic
material to any material extent.
8. The method of facing tools which in-
cludes associating a tungstic material with a
metal of relatively low melting point, simul-
taneously depositing the material and metal
on a tool, as by welding, with a heat incapable
of melting the tungstic material to any ma-
terial extent, causing a fusion to take place
between the metal of low melting point and
the metal of the tool, and allowing the metal
to cool and harden about the tungstic mate-
rial and thus anchor the tungstic material in
place.
9. The method of facing tools which in-
cludes associating a hard material of rela-
tively high melting point with a metal of
relatively low melting point, simultaneously
depositing the hard material and metal on a
tool, as by welding, with a heat incapable of
melting the hard material to any material ex-
tent, causing a fusion to take place between
the metal of low melting point and the metal
of the tool, and allowing the metal to cool
and harden about the hard material and thus
anchor it in place.
10. The method of facing tools which in-
cludes associating pieces of an alloy contain-
ing tungsten and carbon with a metal of rela-
tively low melting point, simultaneously de-
positing the alloy and metal on the tool, as
by welding, with a heat incapable of melt-
ing the alloy to any material extent, causing
a fusion to take place between the metal of
low melting point and the metal of the tool,
and allowing the metal to cool and harden
about the alloy and thus anchor the alloy in
place.
11. The method of facing tools which in-
cludes associating particles of an alloy con-
taining tungsten and carbon which are of
such size that they are incapable of being
completely melted under a welding tempera-
ture with a metal of relatively low melting
point, simultaneously depositing the parti-
cles and metal on a tool, as by welding, with
a heat incapable of melting the particles to
any material extent, causing a fusion to take
place between the metal of low melting point
and the metal of the tool, and allowing the
metal to cool and harden about the particles
and thus anchor them in place.
12. The method of applying hard meta
particles to a surface to be protected thereby
which comprises welding a material of low

between the material of low melting point and the material forming the surface, and allowing the molten material to cool and harden about the pieces of material of high melting point and thus fasten them to the surface to be protected.

13. The method of applying hard metal particles to a surface to be protected thereby which comprises associating together pieces of material of high melting point with a material of low melting point and welding the associated materials on the surface without melting or fusing the pieces of material of high melting point to any material extent, causing a fusion to take place between the material of low melting point and the material forming the surface, and allowing the molten material to cool and harden about the pieces of material of high melting point and thus fasten them to the surface to be protected.

14. The method of applying hard particles to a surface to be protected thereby which comprises inclosing pieces of material of high melting point in a material of low melting point and welding both materials on the surface without melting or fusing the pieces of material of high melting point to any material extent, causing a fusion to take place between the material of low melting point and the mate ial forming the surface, and allowing the molten material to cool and harden about the pieces of material of high melting point and thus fasten them to the surface to be protected.

15. The method of applying hard particles or pieces to a surface to be protected thereby which comprises associating the particles or pieces with a material of relatively low melting point, depositing both materials on the surface as by welding, causing a fusion to take place between the material of low melting point and the material forming the surface, and allowing the molten material of low melting point to cool and harden about the particles or pieces and thus fasten them to the surface.

16. The method of applying hard particles to a surface to be protected thereby which comprises associating together pieces of material of high melting point with a material of low melting point, welding the associated materials on the surface without melting or fusing the pieces of material of high melting point to any material extent, allowing the molten material to cool and harden about the pieces of material of high melting point and thus fasten them to the surface to be protected, and coating the applied materials with a protecting coating of metal.

17. The method of applying hard particles to a surface to be protected thereby which

plying heat to the materials to melt the r terial of low melting point, and causin fusion to take place between the mate of low melting point and the material fo ing the surface without melting or fus the pieces of material of high melting pc to any material extent, allowing the mol material to cool and harden about the pi of material of high melting point and t fasten them to the surface to be protected

18. The method of forming a drilling cutting tool that includes, securing a ting element to a cutter body by a fusible comparatively tough material, and apply to the surface of the cutter body about s element a sheath of comparatively bri material.

19. The method of forming a drilling cutting tool that includes securing a ting element to a cutter body by a fusible comparatively tough material, and cover said element and the surface of the cu body with a sheath of comparatively h and brittle material.

20. The method of forming a drilling cutting tool that includes, applying a cut element to a cutter body in a matrix of c paratively tough material, and covering element and the surface of the cutter b with a sheath of comparatively brittle m rial, the last mentioned material being greater hardness than the material form the matrix.

21. The method of forming a drilling cutting tool that includes, applying a cut element to a cutter body in a matrix of c paratively tough material, and covering element and the surface of the cutter b with a sheath of comparatively brittle terial, the materials forming the cutting ment, sheath and matrix being respectivel decreasing hardness.

22. The method of forming a drilling cutting tool that includes studding a cu body with cutting elements secured to body in a fused matrix of comparati tough material, and covering the stud surface of said body with a fused sheat comparatively brittle material, the last r tioned material being of greater hard than the material forming the matrix.

23. The method of forming a built-up ter blade that includes studding the b along its edge with cutting elements sec to the blade in a fused matrix of comp tively tough material, and covering studded face of the blade with a fused sh of comparatively harder and brittle m rial.

24. A drill bit embodying a cutter b a cutting element secured to said body

urface of the cutter body and embedding cutting element.

. A drill bit embodying a cutter body led with cutting elements, said elements g secured to the body in a fused matrix mparatively tough material, and a fused h of comparatively harder and brittle rial covering the studded face of the

testimony whereof we have signed our s to this specification.

WINSTON F. STOODY.
SHELLEY M. STOODY.
NORMAN W. COLE.

In the District Court of the United States, Southern District of California, Central Division.

In Equity No. Y-101-J.

STOODY COMPANY, a corporation,

Plaintiff,

vs.

MILLS ALLOYS, INC., a corporation, et al.,

Defendants.

INTERLOCUTORY DECREE.

This cause came on to be heard at this term upon exceptions of the defendants to the report of the Special Master filed herein, and the motion of the defendants to re-refer the cause to the Special Master for the purpose of taking additional testimony and making a further report, and oral arguments having been presented and points and authorities having been filed, and the Court having given full consideration to the defendants' exceptions and the said motion:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

(1) That defendant's motion to re-refer the cause to the Master for the purpose of taking further testimony be and the same is hereby denied.

(2) That the defendants' exceptions to the report of the Special Master be and they are hereby overruled.

(3) That the findings of the Special Master be and they are hereby adopted as the findings of the Court.

(4) That Letters Patent No. 1,803,875, dated May 5, 1931, for method of facing tools and resultant product, being the Letters Patent in suit, are good and valid in law as to claims 5, 6, 7,

10, 11, 12, 13, 14, 15 and 17, thereof, and are owned by the plaintiff, and that defendants have contributed [19] to the infringement of said claims.

(5) That a writ of injunction issue out of and under the seal of this Court directed to the defendants perpetually enjoining and restraining the said defendants, Oscar L. Mills and Mills Alloys, Inc., its directors, officers, associates, attorneys, clerks, workmen and employees, and each of them, from directly or indirectly manufacturing, using or selling welding rods, such as Plaintiff's Exhibit #15 herein, with the intention that such welding rods be used within the United States of America, or its territorial possessions, in the practice of the process described in said claims 5, 6, 7, 10, 11, 12, 13, 14, 15 and 17 of said Letters Patent, and from in any wise infringing said claims of said Letters Patent or contributing to the infringement thereof.

(6) That David B. Head is hereby appointed Special Master for the purpose of an accounting to report his recommendations to this Court as to the amount of plaintiff's damages and the gains or profits made by the defendant, Mills Alloys, Inc., by reason of such infringement. In accordance with the findings, the question of whether there is any personal liability of the defendant Oscar L. Mills is reserved for the accounting.

(7) That the plaintiff recover of the defendants its costs and disbursements herein in the sum of $.....

(8) Exception is allowed as to each of the orders herein as to defendants, and each of them.

DATED this 18 day of June, 1935.

(Signed) WM. P. JAMES,
United States District Judge.

Approved as provided in Rule 44.

JOHN FLAM &
PHILLIP GRAY SMITH. [20]

[Title of Cause.]

MINUTE ORDER.

The issues in this cause were heretofore referred to a Special Master with instructions to hear the evidence offered by the parties, make up his conclusions of fact and recommend to the court what decree should be entered herein, the law applicable being considered; and after hearing in accordance with the order of reference the Master duly made his report recommending a decree in favor of the plaintiff as to specified claims of plaintiff's patent designated in his report; and thereafter the defendants filed exceptions to the Master's report, and at the same time presented a motion asking the court to re-refer the cause to the Master for the purpose of taking further testimony; and the matter of said exceptions and said motion having been argued to the court both by oral argument and the filing of points and authorities; and now, after fully considering the argument so made, and the report of the Master and the record of the hearing before that officer, the Court concludes that the report should be approved and the exceptions thereto overruled. Further, that the motion to reopen the cause for the taking of further testimony should be denied. IT IS THEREFORE ORDERED that the exceptions to the report of the Special Master be and they are overruled; the findings of [21] the Master are adopted as the findings of the Court, and the motion to reopen the cause for the taking of further testimony is denied. An exception in favor of defendants is noted to the making of this order. Decree will be prepared accordingly, which decree shall provide for a further reference to the same

Master for the purpose of an accounting to ascertain the amount of plaintiff's damages.

(Entered on Judge James' Minutes June 11, 1935.)

Copies mailed to:

CHARLES C. MONTGOMERY, Esq., and
FRED MILLER, Esq.,
810 Title Guarantee Building,
Los Angeles, California.
JOHN FLAM, Esq., and
PHILIP G. SMITH, Esq.,
1224 Security Title Insurance Bldg.,
Los Angeles, California.
DAVID B. HEAD, Esq.,
Federal Building,
Los Angeles, California. [22]

[Title of Court and Cause.]

REPORT OF SPECIAL MASTER.

To the Honorable Judges of the United States District Court, Southern District of California, Central Division:

The undersigned, DAVID B. HEAD, to whom the above entitled cause was referred by an order entered herein on January 30, 1934, directing him to take and hear the evidence offered by the parties, to make findings of fact and conclusions of law and to recommend the judgment to be entered, herewith submits his report:

The cause was set down for the taking of testimony. On March 12, 1934 the following appearances were made: for the plaintiff, Fred H. Miller, Esq. and Charles C. Montgomery, Esq., for the defendants, John Fram, Esq. and Philip Gray Smith, Esq. Testimony was taken from day to day. On April

3, all parties rested. On April 13 the case was argued and submitted.

The action is in equity by the Stoody Company, as assignee, prior to issue, of Letters Patent No. 1,803,875, for the alleged infringement of said letters patent by the defendants. The defendants deny infringement and rely upon several defenses attacking the validity of the patent and the further defense that the issues herein are res adjudicata by reason of the decree in a prior suit, No. R-94-M in this court. The defendants contend that the patent in suit is [23] invalid (1) in that the disclosure thereof was anticipated by several prior patents and publications, (2) in that the process of the patent was not first invented by the plaintiff's assignors but was in fact the invention of others, (3) in that the invention was used publicly by several others prior to the alleged invention of plaintiff's assignors, (4) in that no inventive faculty was exercised, (5) in that the claims relied upon are too broad.

The general field of this inquiry has been considered previously in this court in the case of Stoody Company vs. Mills Alloy, Inc., et al, R-94-M, and by the Circuit Court of Appeals in the same case, 67 F (2d) 807.

The method of the patent relates to the facing of tools, particularly those used for the drilling of oil wells. A mild steel tube of low melting point is filled with particles of a substance of high melting point. Tungsten carbide is preferred for the substance of high melting point. The tube is then melted by the flame of an oxy-acetylene torch and deposited on the cutting surface of the tool as shown in Figure 3 of the patent drawings. The tungsten carbide particles are not affected by the heat of the torch. As the steel fuses and flows into the weld the tungsten carbide particles are carried with it. When the steel solidifies the tungsten carbide is found distributed throughout the

steel as discrete particles. When the tool is used these hard particles as they are exposed by wear, become a part of the cutting face of the tool.

The purpose of using mild steel for the tube is stated in the patent, page 1, lines 69 to 75,

> "The object of using a mild tool steel as the tube in the welding rod is to provide a bond or binder for the particles 2 of the hard alloy which bond or binder is fusible at a temperature which will not cause the alloy to form gases or oxidize, which would result in fissures or blow-holes." [24]

The patent describes the application of a second facing of hard alloy. No claims covering this second facing are in issue.

DEVELOPMENT.

The applicants Winston F. Stoody and Shelley M. Stoody as officers and employees of the plaintiff company were engaged in 1926 in the development, manufacture and sale of welding rods for use in hard facing of oil well tools. Some testimony was taken concerning experiments made in 1926 by the Stoodys which need not be gone into. Immediately after Christmas, 1926, Normal W. Cole was employed by the Stoody Company as a chemist and metallurgist. On February 19, 1927, Frederick Stone of the Stone Drill Corporation went to the office of the Stoody Company and displayed to the Stoodys two pieces of metal known as Thoran and an article in Engineering and Mining Journal (Exhibit A). Thereafter Cole made an analysis of the material and determined that it was tungsten carbide. The Stoodys and Cole set about to duplicate this material. Within a few days they were able to produce a small quantity of tungsten carbide. They proceeded rapidly to produce the

material in commercial quantities. The first was sold to Stone. It was in the form of a round stick 3/16 inch in diameter and 1½ to 2 inches in length. It was given the trade name of Borium. Smaller pieces were marketed as pea Borium (Exhibit 25). The application of these materials will be considered later.

Sometime prior to June, 1927, Shelley Stoody had learned that tungsten carbide was not appreciably affected by the heat of the acetylene torch. Under the direction of the Stoodys several experiments were conducted by Cole in an effort to combine tungsten carbide particles with other materials in a welding rod. None of these experiments resulted in a useful rod. [25] It has been satisfactorily established that during the latter half of June, 1927, a rod containing tungsten carbide particles enclosed in a mild steel tube was made in the Stoody plant and that this rod was used to face a so-called Zubelin bit. The material was applied by a welder using an acetylene torch by causing the torch to melt the steel tube and carry with it the tungsten carbide particles into the weld. The tungsten carbide particles were not affected by the heat of the torch and were embedded in mild steel after it solidified on the face of the bit. This Zubelin bit was run successfully in a well and afterwards returned to the Stoody plant.

This was the first successful use of the method of the patent and for the purpose of this case may be considered as the date of the invention.

THE PRIOR ART.

Prior to the use of the method of the patent drilling tools were faced with hard materials in several ways. One method was to weld a layer of a hard homogeneous alloy such as stellite or stoodite. The material was cast in rod form and deposited

by welding with the electric arc or acetylene torch. Other rods of composite materials were designed for the same use with the exception that the materials formed an alloy when fused during deposition. The Mills Oxite rod is an example.

This rod was made in the form illustrated in Figure 3 of the Mills patent, Exhibit H-1. A mixture of tungsten, ferro-tungsten and other materials in powdered form was placed in a mild steel tube and baked several hours at a red heat. It was intended that the rod be used with an acetylene torch to produce a homogeneous alloy in the resulting weld. At times the weld produced was rough in appearance due to the failure [26] of all the material to fuse under the heat of the torch. The materials forming the unfused portions of the weld have not been identified. No embedding of hard particles was either intended or appreciably accomplished. The use of the Oxite rod did not anticipate the method of the patent. In the decision of the Patent Office in the interference which will be referred to hereafter the Mills Oxite rod is thoroughly and carefully considered.

For drilling in hard formations, black diamonds had been used for many years. They were set in the face of the tool by drilling a hole of approximately the size of a stone and carefully caulking the diamond in the hole. Late in 1925 Frederick Stone of the Stone Drill Corporation (which need not be distinguished from the Diamond Drill Contracting Company or the Doheny Stone Drill Corporation) obtained a material known as Thoran which was made in Germany. (See contemporary article in Iron Age July 16, 1925, page 151, Exhibit H-33). Stone used this material as a substitute for diamonds. His diamond setters caulked pieces of Thoran into the face of the tool in the same manner as they had been accustomed to use diamonds. It was a sample of this material that he took with

him on his visit to the Stoody plant in February 1927. At the Stone plant Thoran was fixed in drilled holes by flowing molten solder, brass, silver, stellite and other material around the pieces after they were placed in the holes. In this operation the flame of the welding torch was kept away from the Thoran as much as possible from fear of damage to the Thoran. These operations were performed prior to the Stoodys first work with tungsten carbide.

Several of the prior uses pleaded relate to the so called hot rod method. There are distinct issues of fact presented as to the origin of this method. It has now become a *a* [27] standard method of applying the larger sized pieces of tungsten carbide. In this method the welder uses tungsten carbide particles, usually of pea size, an acetylene torch and a mild steel welding rod. He uses the torch to bring the tool surface to a molten state. He then heats the welding rod until the end is molten and then presses the molten end of the rod down on a piece of tungsten carbide causing the piece to adhere to the rod. He then transfers the rod to the tool face and with the torch melts off the end portion of the rod together with the tungsten carbide particle. Sufficient steel is melted off to form a matrix around the tungsten carbide. This is repeated until a sufficient number of pieces have been set on the tool face. The resulting weld is illustrated by Exhibit 55. If small particles are used, several may be picked up at the same time.

The evidence establishes that Shelley Stoody and other workers in the Stoody plant were applying pieces of Borium by the use of the hot rod method prior to the work on the Zubelin bit in June of 1927. The defendants have offered evidence of several alleged prior uses of the hot rod method. They have also

pleaded in effect that these alleged uses were prior inventions by certain ones of the users.

1. Use by Charles A. Dean at Coalinga, California.

As to this use it is found that Charles A. Dean who operated a welding shop in Coalinga, California, welded hard surfacing material over pieces of Thoran metal which had been previously set in drilled holes in core bits. These pieces were set in the same manner as black diamonds. It is found that it is not true that Dean used the hot rod method in setting small pieces on bits or tools. The work that Dean did was on core bits of the Diamond Drill Contracting Company during a period from the spring of 1926 until the winter of 1926-1927 [28]

2. Use by Charles Sulzer and others near Thompson, Utah.

Evidence was offered tending to show the use in November 1926 of the hot rod method in applying pieces of hard material to bits. The work was being done on a well being drilled near Thompson, Utah, by Charles Sulzer as foreman using tools supplied by the Stone Drill Corporation. The evidence is not sufficient to establish this alleged use.

3. Use by Roland O. Picken and others at Los Cerritos Field and Los Angeles, California.

Evidence was offered tending to proof that Picken welded a piece of Thoran on the edge of a fish tail bit and that the bit was run in a well at Los Cerritos on January 7, 1926. This evidence was rebutted to the extent that it is found that no such use was made.

4. Use by Frederick Stone and others at the Stone Drill Corporation plant at Glendale, California.

Frederick Stone was the active manager of the Diamond Drill Contracting Company which was succeeded by the Stone Drill

Corporation. The period of time in question is from the fall of 1925 to the summer of 1927. Irwin Mayer was the shop superintendent at the Stone plant in Glendale. William De Long was a welder and welding shop foreman in the Stone plant.

The testimony of the defendant's witnesses was to the effect that Stone first obtained Thoran from Shaffner and Allen, the New York representatives of the German manufacturers in 1924 and that it was first set in the same manner as black diamonds. Later the Thoran pieces were fixed in place in holes drilled in the tool by flowing bronze or other material around the pieces. The witnesses fix the first use of the hot rod method as of the fall and winter of 1926. Further testimony [29] is to the effect that Shelley Stoody first learned of the hot rod method while on a visit to the Stone plant in the year 1927. The witnesses fix the date of the first use of the hot rod method in reference to the refusal on the part of Shaffner and Allen to give credit for broken pieces of Thoran returned to them. This date is fixed by them as around April or May of 1926. However the correspondence between the Stone Drill Corporation and its predecessor and Shaffner and Allen unquestionably shows that the first Thoran was ordered in December of 1925, and that credit for small particles was refused by a letter written August 18, 1927. Reference is made to Exhibits 56, 57, 58, 59, 60, 61. It is evident that the recollection of these witnesses is in error to the extent of one year in time. They fix the visits of Shelley Stoody to the Stone plant by reference to the purchase of an electric arc welding machine. The invoice, Exhibit 41, shows that these visits must have occurred after May 10, 1927, rather than in the early part of the year. The mistakes as to these dates were honestly made by the witnesses, and the fact that they disclosed the means by which they fixed

the dates in question was ultimately of great assistance in ascertaining the true state of facts.

The conclusion is reached that there was no use of the hot rod method at the Stone plant prior to the use of that method by the Stoodys. It follows that there was no prior invention made by the alleged users at the Stone plant.

The use of the hot rod by Shelley Stoody and others in the Stoody plant did not constitute a prior public use. While it was still their own the Stoodys and Cole could use that knowledge in the further development of their ideas. Eck vs. Kutz 132 Fed. 758. In re Peiler 64 Fed. (2) 984.

It follows that the hot rod method was neither an anticipation or a part of the prior art insofar as the method [30] of the patent is concerned.

THE PRIOR PUBLISHED ART.

The prior published art consists of United States and foreign patents and magazine articles.

Certain of the patents cited such as Mills 1,650,905, Exhibit H-1, and Jones 1,387,157, Exhibit H-3, illustrate the practice of combining various substances in a rod for the purpose of facilitating the use of the materials so combined in a weld. These patents were considered in the previous case, R-94-M. In that case these disclosures considerably influenced the conclusion of non-invention.

Other patents teach the use of abrasives by affixing pieces thereof in a matrix of metal. Boxley, Exhibit H-14, teaches the moulding of a matrix around a piece of hard abrasive such as carborundum. Marius. Exhibit H-18, Meyer's Exhibit H-24, and Chamberlin, Exhibit H-25, follow the same idea. The Austrian patent No. 6,804 contemplates the association of abrasives in

granular form by molding or compression. None of this group teaches a welding process.

Thoran was first described in this country in the July 16, 1925 issue of The Iron Age, Exhibit H-33. This article described its characteristics, giving its melting point as 5400° F. and its hardness 9.8 to 9.9 on the mineral scale. It stated that it could not be forged.

The German publication, "Gluckauf", in the issue of December 18, 1926, Exhibits H-24 and U, described the use of Volomit and Thoran for the facing of drill bits. It described the setting of stick of the material in holes in the tool and soldering them in place with brass or hard solder. There is no suggestion that the hard material and the brass or solder could be simultaneously deposited by welding.

The German patent No. 427,074, Exhibit V, is [31] directed to the introduction of tungsten carbide in granular form into other metals or alloys to increase their hardness. The patent states: "With some metals we find merely an embedding". The process consists of introducing tungsten carbide into a mass of molten metal. No mention is made of welding or a previous association of tungsten carbide with other materials.

The second Chesterfield patent, Exhibit H-16, relates to the casting of an alloy, containing crystals of tungsten carbide in such a manner that the crystals do not enter into solution but remain as such in the finished product. This is not a welding operation.

STOODY VS. MILLS, R-94-M, 67 F (2) 807

The defendants set up the decree in this case under their plea of res adjudicata. The action was between the same parties on a patent the claims of which read on the welding rod which

preferably is used in carrying out the process of the patent in suit. Claim 3 of the welding rod patent reads:

> "3. A welding rod comprising a metal of comparatively low melting point and pieces of an alloy containing tungsten and carbon associated therewith."

The master reported in that case that the patent was invalid for want of invention over the prior art. The report at lines 21 and 22, page 8, specifically points out that no process claims were involved.

One finding of fact in that case differs from a finding herein. In the first case a finding was made that the hot rod method was prior to the invention claimed. This finding resulted from a colloquy between counsel and the master. This colloquy is copied in Plaintiff Reply Argument to Defendants Objections to Plaintiff's Interrogatories found [32] in the file of this case. Although the remarks of plaintiff's counsel are equivocal the colloquy in effect resulted in a stipulation insofar as the issues in that case were concerned. Neither party should be bound by that stipulation in this action. The evidence in this case tends to further support the findings in the prior case as it appears that once the process of the patent was conceived the prior art was fully ready to provide the physical structure for combining the materials to be welded.

At the time the first case was tried the patent in suit had not issued. At that time the claims here in issue were in an interference in the Patent Office between the defendant Mills and the plaintiff's assignors. The defendant Mills had copied the claims in issue for the purpose of the interference. That interference was determined in the favor of the plaintiff's assignors. An appeal from that decision was dismissed. This

dismissal was incident to the proceedings in the instant case and should not be considered as adding to the effect of the decision of the Examiner of Interference (Exhibit 5). Plaintiff urges that this decision estops the defendants from asserting invalidity of the claims in issue. The law appears to be well settled that the interference does not constitute an estoppel.

However the defendants cannot with good grace now set up the decree in the case R-94-M as res adjudicata when they were contending in the Patent Office for the claims here in issue during all of the time that case was pending.

Defendants have cited cases such as Vapor etc. vs. Gold 7 F (2) 284 which are not in point. In that case it was held that plaintiff was estopped from setting up claims that could have been set up in a prior suit. The patent in suit had not issued at the time of the first case and obviously no cause of action had accrued. [33]

COMMERCIAL SUCCESS.

The master observed certain demonstrations of the use of the hot rod method and the tube method of applying tungsten carbide. The tube method described in the patent results in a distinct saving in time and a better and more uniform product. Its use has become general in the oil tool industry. The plaintiffs have developed in a short time a large business in the sale of tungsten carbide in tubes under the trade name of Borium.

VALIDITY.

In view of the state of the art at the time of the disclosure of the method of the patent it was not known that tungsen carbide and mild steel could be combined together and simultaneously deposited in a weld by the heat of an acetylene torch

to produce a weld in which the tungsten carbide particles would be held embedded in a matrix formed by the steel.

The inventors were at liberty to use their knowledge of the hot rod method in the further conception of the method of the patent. Once having that conception they were equally at liberty to draw upon the prior art for the means by which the materials to be welded could be associated together. That the physical structure of the tube used in carrying out their method was not an invention in itself does not detract from the merit of invention here claimed.

The issues herein go no further as to materials than the use of tungsten carbide and mild steel. The claims generally are broader. They are at least valid as reading upon the disclosure of the use of these two materials and it is not necessary in this case to venture an opinion as to the further scope of the claims.

The claims in issue are 5, 6, 7, 10, 11, 12, 13, [34] 14, 15, 17. Claim 5 is typical:

> "5. The method of facing tools which comprises first associating together a metal of relatively low melting point and pieces of a hard substance of relatively high melting point, supplying heat to the associated mass to cause the metal of low melting point to melt and be deposited on the tool and carry with it the pieces of hard substance depositing them on the tool without materially changing their identity, causing a fusion to take place between the metal of low melting point and the metal of the tool, and allowing the metal of low melting point to cool and harden about the pieces and thus anchor them to the tool."

Claim 10 evidently is drawn to specify tungsten carbide:

> "10. The method of facing tools which includes associating pieces of an alloy containing tungsten and carbon with

a metal of relatively low melting point, simultaneously depositing the alloy and metal on the tool, as by welding, with a heat incapable of melting the alloy to any material extent, causing a fusion to take place between the metal of low melting point and the metal of the tool, and allowing the metal to cool and harden about the alloy and thus anchor the alloy in place."

It is concluded that all of the claims in issue are valid.

INFRINGEMENT.

The defendants are charged as contributory infringers. The defendant corporation, of which the defendant Mills is president and active manager, manufactures and sells welding rods consisting of a mild steel tube filled with particles of tungsten carbide. The defendants products is intended to be used and is used by the defendants customers in facing tools by the use of the method of the patent. It appears that the defendants welding rod can be used in no other way.

The evidence establishes specific use by William Bennett at the Alco Tool Company plant in Los Angeles between [35] June 1931 and December 1932. Bennett used the defendants tubes in accordance with the teachings of the patent. The defendant had knowledge of this use.

Defendants point out that the users of their welding rod do not perform the first step of the process, i. e., the associating of the two materials. However, the defendants place the materials in their hands with this step already performed and the association of the materials continues until further steps are taken. The claims are not happily worded in this respect, but not to the extent that defendants can avoid infringing them.

WHEREFORE, IT IS CONCLUDED:

1. That this is an action in equity arising under the Patent Laws of the United States over which this court has jurisdiction.

2. That title to Letters Patent No. 1,803,875 is vested in the plaintiff.

3. That said Letters Patent and particularly claims 5, 6, 7, 10, 11, 12, 13, 14, 15 and 17 thereof, are good and valid in law.

4. That the defendants have contributed to the infringement of said Letters patent by their acts as herein found.

RECOMMENDATION.

That a decree be entered in accordance with this report and that the defendants be enjoined from the acts herein found to contribute to the infringement of the Letters Patent in suit and that an accounting of profits and damages be had. The injunction may issue against the defendant Oscar L. Mills and the question of his personal liability in damages reserved for the accounting.

This report in the form of a draft was submitted [36] to counsel. Exceptions, objections and suggestions were filed by the defendants. Additional findings have been made on the issue of infringement. Amendments have been made in response to paragraphs II and V of the exceptions. In other respects the report is filed as drafted.

Returned herewith is the file in the case together with the exhibits, transcript and papers relating to the proceedings on reference.

Respectfully submitted,

(Signed) DAVID B. HEAD.

[Endorsed]: Filed Jun. 18, 1935. [37]

In the United States District Court, Southern District of California, Central Division

In Equity On Letters Patent No. 1,803,875,
Issued May 5, 1921. Eq. 690-J.

STOODY COMPANY, a corporation,

Plaintiff,

vs.

HAYNES STELLITE COMPANY, a corporation,

Defendant.

ORDER TO SHOW CAUSE.

On motion of plaintiff's counsel, Fred H. Miller, and upon verified Bill of Complaint filed herein and the affidavits attached hereto, it is ORDERED that the defendant show cause, if any there be, before this Court on July 1, 1935 at the hour of 10 A. M. of said day, or as soon thereafter as counsel can be heard:

Why a preliminary injunction should not be issued against said defendant, enjoining it, its directors, officers, associates, clerks, servants, workmen, employees and confederates, and each of them, from directly or indirectly manufacturing, using and/or selling, and/or causing to be manufactured, used and/or sold, and/or threatening to manufacture, use and/or sell Haystellite Composite Rod and Tube Haystellite made in accordance with the invention and improvement or discovery of Letters Patent No. 1,803,875, dated May 5, 1931, and/or from supplying to the trade ingredients or supplies from which welding rods embodying said invention can be manufactured and/or from in any wise infringing upon said letters patent and/or contributing to the infringement of said letters patent by others, and/or conspir-

ing with others to so infringe said letters patent in any way whatsoever. [38]

And it is further ORDERED that the defendant shall have up to and including the 26 day of June, 1935, in which to file reply affidavits, and that the plaintiff shall have up to and including the 1 day of July, 1935, in which to file rebuttal affidavits.

It is further ORDERED that the physical exhibits referred to in the affidavit of Walter Schumert as having been given to plaintiff's counsel, Fred H. Miller, Esq. be held open to inspection of the defendant during all reasonable business hours until such time as hearing may be had upon this order.

(Signed) WM. P. JAMES,
United States District Judge.

[Endorsed]: Filed Jun. 19, 1935. [39]

[Title of Court and Cause.]

ORDER.

It appearing that subpoena ad res and copy of plaintiff's motion for a temporary injunction and the order of this Court thereon were not served upon defendant until June 24, 1935, and it being represented to the Court that the defendant, Indiana corporation, has no officer within the state and there is not time for the transmission of copies of said bill of complaint, etc. to said defendant to enable it to prepare a showing in opposition to said motion and serve the same in accordance with the said order of this Court, now, upon motion of Gibson, Dunn & Crutcher and Lyon & Lyon, appearing upon behalf of defendant,

IT IS ORDERED that said order, insofar as it requires defendant to serve and file reply affidavits in opposition to said

motion for preliminary injunction on or before June 26, 1935, is vacated and set aside and any question of continuance of the hearing of said motion for temporary injunction shall be considered upon July 1, 1935.

Dated, Los Angeles, California, June 26, 1935.

(Signed) WM. P. JAMES
District Judge. [40]

[Endorsed]: Filed Jun. 26, 1935. [41]

[Title of Court and Cause.]

AFFIDAVIT.

State of New York
County of New York—ss.

CHARLES C. SCHEFFLER, being duly sworn, says that he is in charge of the Patent Department of the Haynes Stellite Company, defendant herein, and other affiliated companies of Union Carbide and Carbon Corporation;

On information and belief that the entire correspondence between the Stoody Company, plaintiff herein, and the Haynes Stellite Company regarding plaintiff's patents is composed of the five letters dated January 31, 1931, June 24, 1931, June 29, 1931, September 9, 1931 and September 19, 1931, true copies of which are attached hereto and made a part hereof;

On information and belief that the originals of the letters received and the carbon copies of the letters written by defendant are in the company files and are not at the moment available.

That, knowing that the Circuit Court of Appeals of the Ninth Circuit had held plaintiff's patent 1,757,601 invalid in the case "then pending" (Stoody Company v. Mills Alloys, Inc. et al.,

67 F. (2d) 807) and relying on the letter of September 19, 1931 from plaintiff's attorneys Hazzard & Miller, defendant believed itself entitled to regard the incident as closed and made no preparation for a defense on the merits. [42]

On information and belief that the first indication of a change of attitude on the part of plaintiff was received on or about June 24, 1935 when apparently the Order to Show Cause herein, returnable June 26th, was brought to the attention of a representative of defendant.

CHARLES C. SCHEFFLER

Subscribed and sworn to before me this 28th day of June, 1935.

[Seal] ALBERT C. CORNELL

Notary Public.

Notary Public, Westchester County. Certificate Filed New York County No. 340. New York County Register's No. 6-C-182. Commission Expires March 30, 1936.

[Endorsed]: Filed Jul. 1, 1935. [43]

"COPY"

HAZARD & MILLER
Attorneys and Counsellors
Patents and Patent Causes
Central Building
Los Angeles

January 31, 1931.

Haynes Stellite Co.,
Kokomo, Ind.

Gentlemen:

We write you on behalf of our client, Stoody Company of Whittier, California, for whom we obtained U. S. Letters Patent No. 1,757,601, on a Welding Rod.

We are informed by our client that your concern is manufacturing, using and selling, a welding rod wherein pieces of tungsten carbide are held in rod like form by what appears to be mild steel or an equivalent material of lower melting point. While your rod apparently is not in the form of a tube in which the pieces of tungsten carbide are disposed, we wish to call your attention to claim 7 of the above patent which is not limited to the presence of the tube, and ask that you discontinue such infringement immediately and to account to our client for past infringement. We are enclosing a copy of this patent so that you may be fully advised as to its contents.

Our client has also wished us to call your attention to your advertisement on page 83 of the January issue of the Petroleum World. The disclosure which you make in this advertisement appears to solicit customers to purchase your product for the purpose of building up fish tail bits in such a manner as to infringe our client's patent No. 1,547,842. It is our client's position that such an advertisement on your part renders you a contributory infringer of this patent and we likewise ask that you immediately discontinue such further contributory infringement and account to our client for what has been done in the past. We regret that we are unable to supply you with a copy of this patent at this time.

Will you kindly advise us shortly as to your disposition in regard to these matters.

Yours very truly,
HAZARD & MILLER
(Signed) Per FRED H. MILLER

FHM*MLH. [44]

"COPY"

June 24, 1931

Hazard & Miller, Attys
Central Building
Los Angeles, California

Gentlemen:

Your letter of January 31, 1931, regarding Stoody Company patents Nos. 1,547,842 and 1,757,601, has been referred to our patent attorneys.

After a careful consideration of the matter, they report that in their opinion we are not infringers, either direct or contributory, of any valid claim of either patent.

Very truly yours,
(Signed) E. E. LeVAN
General Sales Manager

E.E.LeVan/CH
cc — Messrs. F. P. Gormely
C. C. Scheffler
W. A. Wissler. [45]

"COPY"

HAZARD & MILLER
Attorneys and Counsellors
Patent and Patent Causes
Central Building
Los Angeles

June 29, 1931.

Haynes Stellite Company
Kokomo Indiana.

Attention—Mr. E. E. LeVan
General Sales Manager.

Dear Sir:

We are in receipt of your letter of June 24th which is in response to our letter of January 31st concerning the Stoody Company patents.

We do not have the benefit of the reasoning of your attorneys by which they arrive at the conclusion that you do not infringe in any way any valid claims of either patent and we cannot see how they can legitimately arrive at this conclusion.

Patent No. 1,757,601 has already been sued upon in this District and the trial has been had. We are at present awaiting decision of the case, which we trust will be in our client's favor.

Since we last wrote you, our client has also received patent No. 1,803,875, which has a close bearing upon patent No. 1,757,601. We are enclosing a copy herewith and ask that you discontinue infringement of this patent also. We would appreciate your acknowledging receipt so that we may establish notice to you of this patent as of this date.

Up until the present time our client has adopted the policy of refraining from bringing suit against other infringers of patent No. 1,757,601 until the Cause now pending has been decided. However, we are submitting your case to them for a possible change of policy. This is based upon the assumption that your attorneys after perusing this patent will likewise arrive at a similar conclusion, that you do not infringe any valid claim therein. We hope, however, that after investigating this patent that your attorneys will alter their opinion as to all three of the patents mentioned in our correspondence.

Yours very truly,

HAZARD & MILLER

(Signed) Per FRED H. MILLER

FHM/MLH. [46]

"COPY"

September 9, 1931

Hazard & Miller, Attys.
Central Building
Los Angeles, Calif.
Gentlemen:

Att: Mr. Fred H. Miller

Your letter of June 29, 1931, in which you call our attention to an additional patent, No. 1,803,875, has been referred to our patent attorneys. They regard this patent as even weaker than its companion, No. 1,757,601; and advise us that we may disregard it insofar as our present and prospective products and practices are concerned.

Very truly yours,
(Signed) E. E. LeVAN
General Sales Manager.

E. E. LeVan/CH
cc — Messrs. F. P. Gormely
W. A. Wissler
C. C. Scheffler. [47]

"COPY"

HAZARD & MILLER
Attorneys and Counsellors
Patents and Patent Causes
Central Building
Los Angeles

Sept. 19, 1931

Haynes Stellite Company
Kokomo, Indiana

Attention Mr. E. E. LeVan

Gentlemen:—

We have your letter of September 9th concerning our client's patent No. 1,803,875. In order that laches can in no way be imputed to our client, we wish to set forth our client's position.

We are at present awaiting a decision of an infringement suit based upon patent No. 1,757,601, of which you are undoubtedly aware as one of your employees was quite regular in attendance in the Court Room during the trial. In the event that the decision in this suit is to the effect that this patent is invalid it is, of course, the intention of our client to let the matter drop as it is neither our client's policy nor ours to harass competitors on an invalid patent.

On the other hand if the decision should be in our client's favor, establishing the validity of the patent, it is our client's intention to immediately proceed against all infringers. We trust that you will appreciate our client's position.

We merely wish to inform you of this so that although some time may elapse before this matter is brought to your attention further, no laches can be imputed to our client's delay in immediately proceeding.

Yours very truly,
HAZARD & MILLER
(Signed) Per FRED H. MILLER [48]

[Title of Court and Cause.]

ANSWER.

To the Honorable the Judges of the United States District Court for the Southern District of California, Central Division:

The defendant above named answers the bill of complaint herein as follows:

1. Defendant is without knowledge save from the bill regarding the incorporation, existence and location of the plaintiff, as alleged in paragraph 1 of the bill.

2. Defendant admits the allegations of paragraph 2 of the bill.

3. Defendant admits that it has sold and intends to continue selling a welding rod known as "Haystellite Composite Rod" and a rod known as "Tube Haystellite" within the Southern District of California, Central Division, and elsewhere within the United States, but denies that it has committed, is now committing or is threatening to commit any acts of infringement as alleged in the bill.

4. Defendant denies infringement but admits each and every other allegation set forth in paragraph 4 of the bill.

5. Defendant admits that an application, Serial [49] No. 250,069, was filed by Winston F. Stoody, Shelley M. Stoody and Norman W. Cole in the United States Patent Office, January 30, 1928, and that United States Letters Patent No. 1,803,875 issued on May 5, 1931 to Stoody Company of Whittier, California, a corporation of California, as assignee of said applicants, and purporting to be based on said application, but defendant is without information or knowledge save from the bill as to the assignment alleged in paragraph 6 of the bill, and

denies each and every other allegation set forth in paragraphs 5 and 6 of the bill.

6. Defendant denies that plaintiff is entitled to sue for injunctive relief against any infringement of said Letters Patent or to recover any profits and/or damages arising out of the alleged infringement thereof, and is without knowledge or information save from the bill of each and every other allegation set forth in paragraph 7 of the bill.

7. Defendant admits that welding rods can be employed in carrying out or placing in effect the method of facing tools purporting to be the invention of said Letters Patent, and that plaintiff has sold such welding rods, and that the alleged invention of said Letters Patent is generally used by purchasers of plaintiff's welding rods; denies that any invention contained in said Letters Patent is of great or any utility or value, and denies knowledge or information save from the bill as to each and every other allegation set forth in paragraph 8 of the bill.

8. Defendant denies that the public has generally acquiesced in the usefulness of any improvements invented by plaintiff's alleged assignors, or has generally acknowledged or acquiesced in the alleged rights of plaintiff or in the alleged validity of said Letters Patent, as alleged in paragraph 9 of the bill, but avers on the contrary that there has been infringement of said Letters Patent by a large number of [50] infringers, as alleged in paragraph 11 of the bill. Defendant is without knowledge or information whether plaintiff has granted licenses under said Letters Patent and as to whether such licensees are required to or do pay any royalty to plaintiff, and whether such licenses are of great or any value to plaintiff because of such alleged royalty, and as to any grounds for plaintiff's expectation to be

paid in the future. Defendant has no knowledge or information save from the bill as to plaintiff's alleged foreign applications and patents, and denies their materiality to the issues of this case. Defendant admits that plaintiff instituted suit upon said Letters Patent in this Court against Mills Alloys, Inc., and Oscar L. Mills, in Equity No. Y101-J, that said cause of action was referred to a special master, and that a report of said special master has been rendered, purporting to be upon the reference to him, to the effect that the claims of the Letters Patent in suit there in issue were valid and infringed, and that such report of the master has been approved by the Honorable William P. James over the exceptions of such defendants, but alleges that the time for an appeal from said decision to the United States Circuit Court of Appeals has not yet expired. Defendant denies each and every other allegation set forth in paragraph 9 of the bill.

9. Defendant denies each and every allegation set forth in paragraph 10 of the bill, except that defendant admits receiving on or about June 29, 1931 a letter from plaintiff's attorneys which stated that plaintiff "has also received patent No. 1,803,-875", but did not charge defendant with infringing such patent.

10. Defendant admits that plaintiff has purposely withheld instituting the present suit against this defendant, and also against a large number of other alleged infringers, but denies that the cause for such delay was as alleged in paragraph 11 of the bill, and alleges on the contrary that plaintiff delayed and stated that it was delaying any such suit for the purpose of first obtaining an adjudication regarding the validity of plaintiff's Letters Patent No. 1,757,601 which have been held invalid by the United States Circuit Court of Appeals for the Ninth Cir-

cuit (opinion reported in 67 F. (2d) 807), and that plaintiff represented to defendant and to other alleged infringers that it would bring no suit upon the Letters Patent now in suit if said decision of the Circuit Court of Appeals for the Ninth Circuit resulted, as it did, in a holding that said Letters Patent No. 1,757,601 were invalid.

11. Defendant admits it has been and now is, within the Central Division of the Southern District of California and elsewhere within the United States, making and selling and causing to be made, used and sold within the Southern District of California and elsewhere within the United States, welding rods containing particles of Haystellite and intended by the defendant to be used in welding said Haystellite to drilling or cutting tools by means of an acetylene torch, which torch is the means used with welding rods publicly since long prior to the alleged invention of plaintiff's assignors and for more than two years prior to the application for the patent in suit; that the defendant in selling said welding rods disclosed to and instructed the purchasers of the welding rods that this was the nature and purpose of said rods; that said acts are against plaintiff's present will, and that defendant intends and has stated its intention of continuing said acts, but denies each and every other allegation set forth in paragraph 12 of the bill.

12. Defendant admits that prior to the commencement of this suit and since the grant of said Letters Patent, it has been manufacturing and selling a welding rod known as "Haystellite Composite Rod" consisting of a large number of [51] fragments of tungsten carbide bound together with a metal of materially lower melting point which is softer than tungsten carbide, and another rod under the name of "Tube Haystellite" consisting of a mild steel tube filled with fragments of tungsten carbide, and that

such rods were manufactured and sold with the intention and instruction that they be used as set forth in paragraph 11 of this answer; but defendant denies each and every other allegation set forth in paragraph 13 of the bill.

13. Defendant further answering said bill upon information and belief avers that the aforesaid Letters Patent No. 1,803,875 are and were at all times invalid and void on the following grounds among others:

(a) That the alleged inventors thereof were not the original, first and joint inventors and discoverers of the alleged method of facing tools and resulting product described and claimed in said Letters Patent, or of any material or substantial part thereof but that, on the contrary, long prior to the alleged invention or discovery by said alleged inventors and more than two years prior to their application for said Letters Patent, the said method and product and all material or substantial parts thereof were known or used by others in this country and were patented or described in printed publications in this and foreign countries, and were patented or caused to be patented by the alleged inventors or their legal representatives or assigns in foreign countries upon applications filed more than one year prior to the filing of said application for said Letters Patent in this country. The prior patents and publications referred to, in so far as at present ascertained, are as follows: [52]

UNITED STATES LETTERS PATENT

Number	Patentee	Date of Issue
215,840	Ludovic Taverdon	May 27, 1879
529,990	James W. Wyckoff et al	Nov. 27, 1894
604,569	August Vilhelm Ringström	May 24, 1898
1,327,098	Daniel P. Kellogg et al	Jan. 6, 1920
1,387,157	Ernest Henry Jones	Aug. 9, 1921
1,572,349	John R. Chamberlin	Feb. 9, 1926
1,613,942	Richard D. Davies	Jan. 11, 1927
1,757,601	Winston F. Stoody et al	May 6, 1930

FOREIGN LETTERS PATENT

French Patent No. 375,338 Rene Bouvier
Applied for—March 4, 1907
Delivered May 11, 1907

German Patent No. 427,074 Siemens & Halske Akt. Ges.
in Berlin-Siemensstadt
Date—March 25, 1922
Issued—March 23, 1926

PUBLICATION

Page 151 of "The Iron Age", a periodical published in the United States, July 16, 1925.

and many other patents and publications which defendant prays leave to insert in this answer by amendment as soon as discovered. The names and addresses of persons alleged to have invented or to have had prior knowledge of and used the method and product patented by said Letters Patent in suit within the United States are the following:

Frederick Stone of and at Glendale, California,
William B. DeLong of and at Glendale, California,
Irwin Mayer of and at Glendale, California.

and the patentees and assignees of said United States Letters Patent above listed and the author of said publication

above named at the addresses given therein and elsewhere within the United States, and others not at present ascertained but which defendant prays leave to insert in this answer by amendment when discovered.

(b) The alleged invention thereof does not constitute patentable invention, improvement or discovery within the meaning of the patent law in view of the prior [53] state of the art as disclosed in the various patents and publications hereinabove enumerated, and in view of what was common knowledge of those above named and others skilled in the art at the time of the alleged invention of the same by said alleged inventors.

(c) The description and disclosure of such alleged invention contained in said Letters Patent are not in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it pertains or to which it is most nearly connected to make, construct and use the same.

(d) The claims of said Letters Patent are vague, ambiguous and indefinite and fail particularly to point out and distinctly claim the part, improvement or combination claimed by the alleged inventors as their invention or discovery.

14. Defendant further avers that the alleged invention of said Letters Patent in suit was fully disclosed in a prior patent to the same alleged inventors and to the same assignee, namely, United States Letters Patent No. 1,757,601 for Welding Rod, patented May 6, 1930; that said Letters Patent No. 1,757,601 fail to claim the method and product disclosed in said patent and claimed in the Letters Patent in suit, and that the plaintiff and its alleged assignors thereby disclaimed and estopped themselves

to claim the alleged invention of the Letters Patent in suit, and abandoned the same.

15. Defendant avers that the Letters Patent in suit disclosed nothing but the method which would necessarily be used and the product which would necessarily result from the normal and expected use of the rod shown in said prior Letters Patent No. 1,757,601 as disclosed in said prior Letters Patent, and as well known and publicly used in the United States before the alleged invention of the Letters Patent in suit and more than two years prior to the filing of the application [54] therefor, and that the Letters Patent in suit are therefore invalid for want of invention.

16. Defendant avers that said prior Letters Patent No. 1,757,601 and Letters Patent in suit No. 1,803,875 contain one and the same alleged invention and were issued on different dates to the same alleged inventors and assignee; that the welding rod patented by said prior Letters Patent No. 1,757,601 has no utility except in using the method and producing the resulting product patented by the Letters Patent in suit; that the method and resulting product patented by the Letters Patent in suit cannot be followed or produced without the welding rod patented by said prior Letters Patent No. 1,757,601, and that the Letters Patent in suit being subsequent constitute double patenting and an attempted unlawful extension of the patent monopoly, and are therefore invalid.

17. Defendant avers that the Letters Patent in suit assert a claim to patent upon the welding rod of said prior Letters Patent No. 1,757,601, that said Letters Patent No. 1,757,601 have been held invalid by a decision of this Court affirmed by the Circuit Court of Appeals for the Ninth Circuit in Stoody Company vs. Mills Alloys, Inc., decided December 4, 1933 and re-

ported in 67 F. (2d) 807, and that neither plaintiff nor its assignors, as defendant is informed and believes, have filed any disclaimer of said invalid Letters Patent either in connection with the Letters Patent in suit or in connection with said prior Letters Patent No. 1,757,601; that the claim of invention asserted by the Letters Patent in suit is therefore excessive in breadth and in scope, and has not been cured within a reasonable time by disclaimer.

18. Defendant avers that if said Letters Patent be given a sufficiently broad interpretation to cover any article made, used or sold by defendant, then said patent is invalid and void in view of the prior state of the art and in view of the prior patents, uses and knowledge referred to in paragraph [55] 13(a) of this answer.

19. Defendant is informed and believes and therefore avers that plaintiff has sold welding rods of the type described in said Letters Patent No. 1,757,601 and has licensed, authorized and permitted the purchasers thereof to use the alleged inventions of the Letters Patent in suit without payment of any royalty to plaintiff for such use; that plaintiff has used and sought to use the Letters Patent in suit to obtain a monopoly in the welding rod of said prior and invalid Letters Patent No. 1,757,601, and has derived substantially its entire reward under the Letters Patent in suit from the sale of said welding rods which are not covered by any valid patent, and that plaintiff has thereby been guilty of unclean hands and such conduct as debars it from any right to enforce the Letters Patent in suit against this defendant or against the public generally.

20. Defendant further avers that plaintiff caused its attorneys on or about January 31, 1931 to give notice to defendant of

said prior Letters Patent No. 1,757,601 charging defendant with infringement of the same through sale of defendant's mild steel welding rod containing pieces of tungsten carbide; that defendant on June 24, 1931 denied that said acts constituted infringement of any valid claim of said Letters Patent No. 1,757,601; that plaintiff on or about June 29, 1931 caused its attorneys to write defendant mentioning Letters Patent in suit No. 1,803,875 without charging that defendant was infringing the same; that on September 9, 1931 defendant replied to plaintiff's attorneys stating that defendant's attorneys advised that defendant might disregard said Letters Patent in suit in so far as defendant's present and prospective products and practises were concerned; that on or about September 19, 1931 plaintiff caused its attorneys to send in reply to said letter of defendant a letter reading as follows: [55½]

"HAZARD & MILLER
Attorneys and Counsellors
Patents and Patent Causes
Central Building
Los Angeles

Sept. 19, 1931.

Haynes Stellite Company,
Kokomo, Indiana.

Attention Mr. E. E. LeVan

Gentlemen:

We have your letter of September 9th concerning our client's patent No. 1,803,875. In order that laches can in no way be imputed to our client, we wish to set forth our client's position.

We are at present awaiting a decision of an infringement suit based upon patent No. 1,757,601, of which you are undoubtedly aware as one of your employees was quite regular in attendance in the Court Room during the trial. In the event that the decision in this suit is to the effect that this patent is invalid it is, of course, the intention of our client to let the matter drop as it is neither our client's policy nor ours to harass competitors on an invalid patent.

On the other hand if the decision should be in our client's favor, establishing the validity of the patent, it is our client's intention to immediately proceed against all infringers. We trust that you will appreciate our client's position.

We merely wish to inform you of this so that although some time may elapse before this matter is brought to your attention further, no laches can be imputed to our client's delay in immediately proceeding.

Yours very truly,

HAZARD & MILLER,

(Signed) Per Fred H. Miller."

By said letter plaintiff meant and was understood by defendant as meaning, that plaintiff was awaiting the decision in the suit brought by plaintiff against Mills Alloys, Inc., et al., and then pending in this Court, and that no suit would be brought against defendant on the Letters Patent in suit if said prior Letters Patent No. 1,757,601 were held invalid in said suit against Mills Alloys, Inc., et al.; that the defendant relied on said representation and meaning and continued the acts now alleged to infringe in said reliance and in the belief that said prior Letters Patent No. 1,757,601 would be held invalid; that said prior letters

Patent No. 1,757,601 were held invalid in said suit brought by plaintiff against Mills Alloys, Inc., et al., and such holding affirmed by the United States Circuit Court of Appeals for this Circuit [56] December 4, 1933; that in reliance thereon defendant has continued and developed its business in the sale of welding rods which is now alleged to infringe the Letters Patent in suit, and has invested large sums in such business; that the plaintiff has failed until after the filing of the bill of complaint herein to give any notice or warning that it desired to withdraw said representation or that it intended to sue this defendant for infringement of the Letters Patent in suit in spite of the decision holding said prior Letters Patent No. 1,757,601 invalid; that the present withdrawal of said representation and the enforcement of the Letters Patent in suit which the plaintiff seeks herein would cause the defendant great damage and injury and would destroy the business which the plaintiff has thus encouraged and permitted the defendant to develop, would result in the unjust enrichment of the plaintiff and gross inequity as between the parties, and that the plaintiff is thereby estopped to bring or prosecute the present suit or to interfere in any way under cover of the Letters Patent in suit with the defendant's said business, and the plaintiff is further debarred by its laches.

21. Defendant further avers that it has not at any time infringed or threatened to infringe any valid right of the plaintiff under the Letters Patent in suit, nor caused the plaintiff any damage or injury whatsoever, and that plaintiff has no right of action against defendant.

WHEREFORE DEFENDANT PRAYS that the bill of complaint herein be dismissed with costs to defendant, and for such

other and further relief as to the Court may seem just and proper.

HAYNES STELLITE COMPANY
By P. F. GORMELY.

Dated July 22, *1933*.

LYON & LYON
Solicitors for Defendant.
L. A. WATSON
D. A. WOODCOCK
LEONARD S. LYON
Of Counsel. [57]

State of New York,
County of New York.—ss.

P. F. Gormely, being first duly sworn, says that he is an officer, to wit the Vice-President, of HAYNES STELLITE COMPANY, the defendant herein, that he has read the foregoing answer and knows the contents thereof, and that the same is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true, and that the means of his knowledge and the ground of his information and belief as alleged in said answer are his duties as such officer and his personal acquaintance with the business of the Company, its records and correspondence.

P. F. GORMELY (L.S.)

Subscribed and sworn to before me this 22nd day of July, 1935.
[Seal] L. A. WAKEFIELD
Notary Public

Notary Public Bronx County, Bronx Co. Clk, No. 6, Reg. No. 32W36 Cert. filed in N. Y. Co. No. 440 Reg. No. 6-W.250. Commission Expires March 30, 1936.

[Endorsed]: Filed Jul. 26, 1935. [58]

[Title of Court and Cause.]

NOTICE OF LODGMENT OF CONDENSED STATEMENT OF THE EVIDENCE UNDER EQUITY RULE 75.

To the above named Plaintiff, and to Messrs. Fred H. Miller and Charles C. Montgomery, its Attorneys:

The defendant herein having appealed from the Order for Preliminary Injunction entered herein on December 6, 1935,—

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that the defendant has lodged with the Clerk of this Court the "Condensed Statement of Evidence" in the above entitled cause, pursuant to Equity Rule 75.

YOU ARE FURTHER NOTIFIED that the defendant by its attorneys will on the 16th day of January, 1936, at the hour of 9:30 o'clock A. M. of that day, in the chambers of the above entitled court, ask the Honorable Wm. P. James, Judge of said Court, to approve said Condensed Statement of Evidence, the same when approved to become a part of the record for the purposes of the appeal.

LYON & LYON
LEONARD S. LYON
HENRY S. RICHMOND
Attorneys for Defendant.

Dated this 6th day of January, 1936. [59]

[Endorsed]: Filed Jan. 6, 1936. [60]

[Title of Court and Cause.]

CONDENSED STATEMENT OF EVIDENCE UNDER EQUITY RULE 75.

Be It Remembered that heretofore, to wit: on Monday, July 29, 1935, the Order to Show Cause why preliminary injunction should not issue, in the above-entitled cause, came on regularly for hearing in the above-entitled Court and before the Honorable Wm. P. James. The plaintiff was represented by Charles C. Montgomery, Esq., and Fred H. Miller, Esq., and the defendant by Leonard S. Lyon, Esq., and Henry S. Richmond, Esq.

WINSTON F. STOODY,

furnishing an affidavit on behalf of the plaintiff, deposed as follows:—

That he is president of Stoody Company, the plaintiff herein, and that he is one of the joint patentees of United States Letters Patent No. 1,803,875, the Letters Patent in suit. He has read the accompanying affidavit of Walter Schumert and has inspected the welding rods purchased by Walter Schumert and the weld made therefrom. That the welding rod purchased by Walter Schumert consists of a steel tube filled with particles consisting principally of tungsten carbide and that, of affiant's own knowledge, these welding rods are being sold and are being used by the trade [61] for the purpose of welding the rods onto well drilling bits and like tools wherein the metal of the tube fuses under the heat of the acetylene torch with the metal of the bit and the particles of tungsten carbide remain unaffected, or substantially so, and are embedded in the matrix formed by the metal of the tube. That the welding rods manufactured and sold by the defendant are the same as those that were being manu-

(Deposition of Winston F. Stoody.)
factured and sold by Mills Alloys, Inc., and Oscar L. Mills, which formed the basis of the suit "Stoody Company vs. Mills Alloys, Inc., and Oscar L. Mills, in equity No. Y-101-J". Not only are the welding rods of the same appearance as those that were being marketed by Mills Alloys, Inc., and Oscar L. Mills, even to the extent of having the ends of the rods painted red, but in addition thereto the rods produce the same character of weld or deposit on the bits. The rods of the defendant herein may be aptly characterized in the same way that the rods of Mills Alloys, Inc., were characterized by Special Master David B. Head in his final report in the case of Stoody Company vs. Mills Alloys, Inc., et al, in equity Y-101-J, where he states under the heading of "Infringement":

> "The defendants are charged as contributory infringers. The defendant corporation, of which the defendant Mills is president and active manager, manufactures and sells welding rods consisting of a mild steel tube filled with particles of tungsten carbide. The defendants' product is intended to be used and is used by the defendants' customers in facing tools by the use of the method of the patent. IT APPEARS THAT THE DEFENDANTS' WELDING ROD CAN BE USED IN NO OTHER WAY."

I am firmly convinced from a comparison of the defendants' welding rod purchased by Walter Schumert with welding rods of Mills Alloys, Inc., that the defendants' welding rod is just as much and is of the same character of infringement as the welding rod of Mills Alloys, Inc., which has already been adjudicated to be an infringement of the patent in suit.

Stoody Company has been engaged in the manufacture and sale of tungsten carbide since March 1, 1927. The plaintiff has

(Deposition of Winston F. Stoody.)

been [62] engaged in the manufacture and sale of tungsten carbide in the form of peas and shapes and also in the form of welding rods forming the subject matter of this controversy.

In the early stages of our business of tungsten carbide more sales were made of pea and shaped tungsten carbide than with tubular welding rods forming the subject matter of this controversy. Stoody Company has expended large sums of money in placing demonstrators in the field to demonstrate to the trade the advantages of welding on tungsten carbide and particularly the advantages of using welding rods containing tungsten carbide. Stoody Company has also spent large sums of money in advertising, having published its own booklet entitled "Fusion Facts", which originally was published monthly but is now being published quarterly. These booklets contain references and disclosures in regard to the advantages of using welding rods which we market under the name of "Tube Borium". As a result of our activities in educating the trade to the use and advantages of welding rods containing tungsten carbide there has been a general change in the trade so that the major portion of the trade now prefers to use our welding rods, as demonstrated by the following table which has been prepared from the books of plaintiff, setting forth the pounds of pea or shaped tungsten carbide sold monthly and the price per pound, and the number of pounds of welding rods that have been sold monthly and the price per pound:

(Deposition of Winston F. Stoody.)

BORIUM SALES

	Borium lbs. oz.	Price lb.	Tube lbs. oz.	Price lb.
		1927		
June	10 oz.	$320.00		
July				
August				
September	6			
October	31			
November	64			
December	77		6.8	$240.00

[63]

		1928		
January	98		37	
February	133		16.12	
March	167	$160.00	1.8	128.00
April	171		1	
May	135		11.10	
June	133		1.9	
July	79		13	
August	105			
September	870	50.00	12	40.00
October	2275		32	
November	1653		23	
December	2206	25.00	38	25.00
		1929		
January	2356		27	
February	2889		1	
March	1719	12.00		12.00
April	2108		53	
May	3222		50	
June	2148		205	
July	2380		201	
August	1554	10.00	448	10.00
September	1873		375	
October	976	8.00	354	8.00
November	2498		1231	
December	3542		551	

[64]

(Deposition of Winston F. Stoody.)

BORIUM SALES

	Borium lbs. oz.	Price lb.	Tube lbs. oz.	Price lb.
		1930		
January	2442		1280	
February	1564		518	
March	3285		606	
April	5481		1112	
May	1061		836	
June	2331		2013	
July	1778		1490	
August	1247		2502	
September	1975		1975	5.00
October	3682		2775	
November	2264		1844	
December	1832		2865	
		1931		
January	1626		2695	
February	1528		2923	
March	1541		3519	
April	1484		1863	
May	2094		2418	
June	653		2331	
July	633		1034	
August	895		1286	
September	365		1519	
October	411		1171	
November	419		1727	
December	510		1204	

[65]

		1932		
January	412		511	
February	395		1373	
March	425		909	
April	510		1275	
May	1221		1590	
June	302		1295	

(Deposition of Winston F. Stoody.)

BORIUM SALES

	Borium lbs. oz.	Price lb.	Tube lbs. oz.	Price lb.
July	788		1797	
August	746		2079	
September	370		1228	
October	248		1812	
November	460		1514	
December	355		1093	
		1933		
January	584		1535	
February	705		613	
March	698		995	
April	507		865	
May	627		1170	
June	1716		1220	
July	818		1547	
August	252		1355	
September	796		2700	
October	918		2498	
November	737		721	
December	1184		2999	

[66]

		1934		
January	1047		1745	
February	1196	2/12/34—5.25	3441	2/12/34— 3.30
		2/17/34—4.55		2/17/34— 2.97
March	3767		10579	
April	1381	4/28/34—7.50 & 8.00	4726	4/28/34— 5.00
May	1514		7461	
June	429		1055	
July	1349		1964	
August	641		2090	
September	653		2259	
October	775		1262	
November	1272		1580	
December	740		1550	

(Deposition of Winston F. Stoody.)

BORIUM SALES

	Borium lbs. oz.	Price lb.	Tube lbs. oz.	Price lb.
		1935		
January	514		2342	
February	1333		4267	
March	1254		2456	
April	1604		3795	
May	2002		2761	

After the plaintiff had placed on the market its welding rods, which were sold under the name of "Tube Borium", the defendant undertook to place upon the market a tube of welding rod such as that shown on page 12 of the Haynes Stellite catalog, a photostatic copy of which is attached to the affidavit of Walter Schumert. This rod is an infringement of plaintiff's patent, but has an unattractive appearance, and due to the unattractive appearance, insofar as I am aware, sales of this welding rod [67] have not amounted to such as to seriously interfere with plaintiff's business.

The defendant had its principal place of business in Indiana and Mills Alloys, Inc., and Oscar L. Mills offered more serious competition within the Southern District of California. Hence, plaintiff instituted suit promptly against Mills Alloys, Inc., and Oscar L. Mills as a test case to determine the validity of plaintiff's patent. The trial of such test case required over fifteen days of actual trial. As set forth in the affidavit of Walter Schumert, the defendant herein recently has elected to bring out on the market tubular welding rods filled with tungsten carbide pieces and I assume from this that the unattractive composite rod heretofore placed upon the market by defendant will shortly be entirely abandoned in preference to making a more direct copy

(Deposition of Winston F. Stoody.)

of plaintiff's welding rod. This more direct type of competition is seriously injuring the plaintiff's business and to a greater extent than the composite rod heretofore marketed by the defendant.

I am informed that the defendant has conspired with some customers to require well drilling tool manufacturers to use only rods of the defendant's manufacture on well drilling tools. Not only does the plaintiff lose the benefit of such sales but where these requirements are insisted upon the manufacturer of the well drilling tool who may have heretofore been using plaintiff's tube borium is required to lay in a supply of defendant's welding rods with the result that he is caused to keep a stock of the defendant's welding rods on hand to supply such customers in addition to stocks of plaintiff's tube borium, which is preferred. I have personally been consulted by plaintiff's customers, who have explained this situation to me and who have explained that inasmuch as some users of well drilling bits have insisted upon using the defendant's products such customers will [68] have to discontinue using all tube Borium in that they cannot afford to keep stocks of both welding rods on hand to satisfy the requirements of particular customers. In this way, plaintiff is not only losing actual sales but in many instances is losing customers who are using the defendant's welding rods, not through preference but in order to satisfy requirements that the defendant has induced to be made. I am informed that plaintiff has no adequate remedy at law for such lost sales. I, therefore, believe that plaintiff's damage if the defendant's activities are allowed to continue will be irreparable.

WALTER SCHUMERT,

furnishing an affidavit on behalf of plaintiff, deposed as follows:

I reside at 661 South Gerhart Street, Los Angeles, California, and I am employed by Stoody Company, the plaintiff herein.

On April 20, 1935, I was requested by Mr. Avery Stewart of Stoody Company to go to the place of business of Haynes Stellite Company, the defendant herein, and procure some tube Haystellite. The Haynes Stellite Company is listed in the Los Angeles telephone directory as having its place of business at 2305 East 52nd Street, Los Angeles, California, and I proceeded to this address on the morning of April 20, 1935. I found the building at this address partly occupied by Linde Air Products Co. I entered the door of the building and went to a counter which divided the room into two sections. An attendant approached and I informed him that I wanted to get a pound of tube Haystellite. He inquired about the size and on informing him that I wanted the size of particles in the tube to be about one-eighth inch in diameter he referred to a loose leaf notebook, read to me the sizes available, and when I selected a tube wherein the particles were capable of passing through a No. 4 screen and which would be caught on a No. 8 screen, he sold me .75 pound of this rod as disclosed [69] upon the attached shipment memorandum. At the time of this sale I inquired as to whether the tube contained anything inside except pure Haystellite and was assured by the attendant that that was all that it contained, namely: crushed particles of Haystellite.

On May 2, 1935, I again went to the same address and purchased two tubes of tube Haystellite. I was waited on by the same attendant who gave me at the time of sale the attached sales order No. L. 6599. I also inquired of the attendant as to whether he had any catalog showing the sizes and prices of tube

(Deposition of Walter Schumert.)

Haystellite. He then produced and gave to me a small folder entitled "Price List Effective March 15, 1935". On examining this list I found that tube Haystellite was listed but that the sizes of the particles of Haystellite in the tube were not given. I remarked to the attendant about this and he agreed that it did not, stating that tube Haystellite had not been out very long and that the attendant was selling it before his company had a chance to get out much advertising matter or catalogs. I then requested that he give me the sizes that were available and I marked them down on the margin of this sheet. At the time of this second sale we had some conversation in regard to the price and the attendant informed me that he had not charged me enough for the purchase that I made on April 20th but that he would not require me to pay the difference. I then inquired of the attendant as to what size welding tip should be used in using this rod. The attendant stated that he did not know as he had not seen any of this rod applied. He informed me that if I had any trouble with it he would send one of the Haynes Stellite Company salesmen over to see me who knew more about how to apply tube Haystellite. At the time of this sale, on May 2, 1935, I was given by the attendant a catalog entitled "Haynes Stellite Products in the Oil Fields". Photostatic copies of pages 12 and 13 [70] of this catalog are attached hereto.

On May 1, 1935, at the request of Mr. Avery Stewart of the Stoody Company, I caused to be prepared comparative welds using one of the tubes of tube Haystellite that I purchased on April 20th and a tube of Stoody Company's tube Borium containing particles of Borium of similar size. These welds were prepared by Mr. Malcolm Whaley, also an employee of Stoody Company, but were made by him at my instructions and in my

(Deposition of Walter Schumert.)

presence. The remainder of the tube of tube Borium and of the tube Haystellite I have preserved and these have been given to Fred H. Miller, attorney for Stoody Company, to be produced in court. The welds produced have been marked on their backs as follows: "Tube Borium 5.1.35 W" to indicate the weld that was made from the tube of tube Borium. The other weld has been marked "Haystellite 5.1.35 W" to indicate the weld that was made from one of the tubes of tube Haystellite that I purchased on April 20, 1935. After the welds were completed their surfaces were ground off against a grinding wheel to expose and show up discrete particles of hard metal embedded in a matrix. From my experience in connection with the manufacture, use, and sale of tungsten carbide, I am convinced that tube Haystellite is intended to be used in the same manner as Stoody Company's tube Borium and is designed to accomplish substantially the same results. This is confirmed by the catalog reference on page 13, a photostatic copy of which is attached, where it is stated:

> "When the rod is applied to the bit the Haystellite particles do not segregate, but spread uniformly over the surface to be protected. They form small sharp teeth that break up the cut and penetrate quickly and easily."

The two welds that were made, using tube Borium on one weld and tube Haystellite on the other, were made under identically the same conditions, every effort being made to produce true and comparative sample welds from the plaintiff's and defendant's welding rods. [71]

(Deposition of Walter Schumert.)

PRICE LIST

HARD-FACING MATERIALS

Effective March 15, 1935

All prices are f.o.b. Kokomo, Indiana, or nearest warehouse and are subject to change without notice.

TERMS—net tenth of month following invoice.

HAYNES STELLITE WELDING ROD

Diameter of Rod	Length of Rod	Price per lb., lots of 1-49 lb.	50-99-lb.	100 lb.
3/8 in.	8 to 14 in.	$3.75	$3.45	$3.25
5/16 in.	6 to 12 in.	3.75	3.50	3.35
1/4 in.	5 to 10 in.	4.00	3.75	3.60
3/16 in.*	4 to 8 in.	5.00	4.75	4.60
1/8 in.**	3 to 7 in.	7.00	6.75	6.60

*Not available in Grade No. 12.

**Not available in Grades No. 12 or No. 6.

Flux-coated rods for electric welding—5 cents per lb. extra.

HASCROME WELDING ROD

Diameter of Rod	Length of Rod	Price per lb., lots of 1-49 lb.	50 lb.
1/4 in.	18 and 36 in.	$0.60	$0.50
3/16 in.	18 and 36 in.	.65	.55

Flux-coated rods for electric welding—5 cents per lb. extra.

HAYSTELLITE INSERTS

Size	Price per lb., lots of 1-9 lb.	10-99 lb.	100 lb.
No. 0, 1, 6, 7, 8, 9 and 10	$7.00	$6.50	$6.25
No. 2 and 3	7.50	7.00	6.75
No. 4 and 5	8.50	8.00	7.75

Prices for Haystellite products are based on combined poundage of Haystellite Inserts, Haystellite Composite Rod and Tube Haystellite.

(Deposition of Walter Schumert.)

HAYSTELLITE COMPOSITE ROD

Type	Price per lb., lots of 1-9 lb.	10-99 lb.	100 lb
No. 2	$7.00	$6.50	$6.2
L and R	5.50	5.25	5.0
N and U	5.25	5.00	4.7
No. 61, 62, 63 and 64—3/8 in. wide	5.00	4.75	4.5
No. 63 and 64—3/8 in. wide	5.25	5.00	4.7

TUBE HAYSTELLITE

Diameter of Tube		Price per lb., lots of 1-9 lb.	10-99 lb.	100 lb
4 on 8				
8 on 16	3/8 in.	$4.75	$4.50	$4.2
16 on 24	5/16 in.	4.75	4.50	4.2
24 on 36	1/4 in.	5.00	4.75	4.5
40 on 50	3/16 in.	5.25	5.00	4.7
100 on 200				

[72

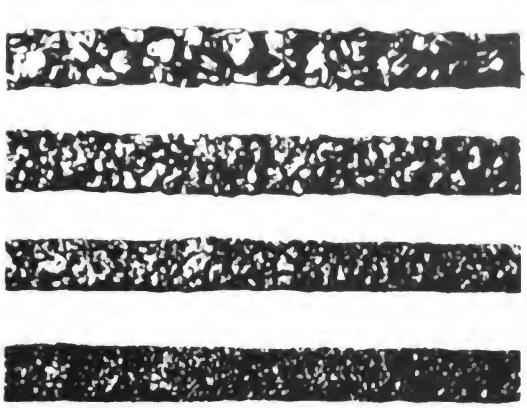
LLITE COMPOSITE ROD

te Composite Rod consists of hard, haped particles of Tough grade Hay- ributed uniformly in a suitable bind- al. The Haystellite is crushed and o insure uniformity in size and the rocessed in a manner that provides nd even distribution throughout the enable drillers to choose the right for every kind of formation, two aystellite Composite Rod are made, rs of either Oxweld No. 1 High-Test aynes Stellite.

h-Test Steel binder results in a de- n has extreme toughness and high ngth. This binder is not as hard as

aystellite Composite Rod
(Original Style)

Per Cent Binder	Screen Size Crushed Haystellite	Binding Material
30	8 on 16	No. 6 Haynes Stellite
30	8 on 16	Oxweld No. 1 H.T. Steel
40	16 on 24	Oxweld No. 1 H.T. Steel
30	4 on 8	Oxweld No. 1 H.T. Steel
40	24 on 36	Oxweld No. 1 H.T. Steel



Haystellite Composite Rod
(New Style)

Type	Per Cent Crushed Haystellite	Per Cent Binder	Screen Size Crushed Haystellite	Binding Material
No. 61	60	40	4 on 8	Oxweld No. 1 H.T
62	60	40	8 on 16	Oxweld No. 1 H.T
63	60	40	16 on 24	Oxweld No. 1 H.T
64	60	40	24 on 36	Oxweld No. 1 H.T

Haynes Stellite and will not resist abrasi the same high degree. It will wear away and the sharp grains of Haystellite will b jected more rapidly. This binder, on the hand, possesses the maximum resistan shock and impact and should be selected great toughness is required. The Com Rods made with High-Test Steel binde the general purpose rods for use on oil drilling tools.

Haynes Stellite binder in Composite should be selected where hardness in the f is more essential than toughness. Haynes lite retains its hardness even at red heat possesses the greatest resistance to abrasi any hard-facing alloy. Haynes Stellite binder results in a slow, uniform projecti the grains of Haystellite as the tool away, because the Haynes Stellite itself r abrasion to a remarkable degree. This ty

en the grains as the bit wears away. ytellite Composite Rod combines the ties of these binders with the hardness, ess and uniformity of crushed Haystel- When the rod is applied to the bit the t lite particles do not segregate, but d uniformly over the surface to be pro- l They form small sharp teeth that break cut and penetrate quickly and easily. ult is long lived bits, faster drilling and t-to-gauge hole per round trip.

n welders prefer the flat or new style ite Rod. These rods consist of flat strips eld No. 1 High-Test Steel to which uni- reen sizes of crushed Haystellite have plied by a special process.

HAYSTELLITE

Haystellite consists of hard, irregular particles of Hard grade Haystellite con- n tubes made of Oxweld No. 1 High- Steel, the Haystellite being screened to uniformity in size.

Hard grade Haystellite used in Tube ite is made with the same careful man- ng control as the Tough grade Inserts. Hard grade is several points harder on well tester than the Tough grade. This al hardness is obtained at a sacrifice ness. Thus the Hard grade Haystellite possess the maximum hardness of all nes Stellite products, and therefore eatest resistance to wear. This grade ot be desirable in the form of inserts, such large pieces would lack the tough- ired to prevent chipping and breaking. orm of Tube Haystellite, however, the ide grains are so small, and are held in firmly by the High-Test steel binder, kage is minimized. When a particle p, a new sharp, hard cutting edge is l which aids the hard-faced drilling enetrating the formation faster.

which the Hard grade Haystellite par contained, furnish the binding materia the grains in place on the hard-faced t steel is well known for its uniformit cellent welding qualities, and its tough high strength. It produces an exce clean, sound deposit, and bonds very with the steel base metal and the pa Haystellite, holding them rigidly.

Thus Tube Haystellite combines t quality products and provides a ha material possessing unique wear-resist ity and great strength.

Tube Haystellite is available in 14-in in the diameters and screen sizes shov table below. All sizes consist of appro 60 per cent Haystellite and 40 per cent No. 1 High-Test Steel, by weight.

Tube Haystellite

Diameter of Tube	Screen Size Crushed Haystellite	Diameter of Tube	
3/16 in.	4 on 8	1/4 in.	5
3/16 in.	6 on 10	1/4 in.	10
3/16 in.	8 on 16	3 16 in.	1
5 16 in.	8 on 16	3 16 in.	2
5/16 in.	16 on 24	3 16 in.	4
1/4 in.	16 on 24	3 16 in.	5
1/4 in.	24 on 36	3 16 in.	10
1/4 in.	40 on 50		

HAYNES STELLITE COMPANY

PACIFIC COAST GENERAL SALES OFFICE

114 SANSOME STREET

SAN FRANCISCO

ORIGINATED AT

Sales Order No. L

M. Schmaert
661 S. Gerhart
Los Angeles, Calif.

Show Execute

ame
. Chas.
ame
ash
Will call

Date Shipped 5-2-35 Class L&T

QUANTITY ORDERED	DESCRIPTION	QUANTITY SHIPPED No. Pieces	QUANTITY SHIPPED WEIGHT	UNIT PRICE
				lb.
.834	3/8" Tube Haystellite 4 on 3			4.75
		Sales Tax		

5

ED BY

ABOVE MATERIAL RECEIVED

CUSTOMER'S NAME

PACKING SLIP WITH GOODS

THE LINDE AIR PRODUCTS COMPANY

UNIT OF UNION CARBIDE AND CARBON CORPORATION

JCC

SHIPMENT

SOURCE OF ORDER			CUSTOMER'S ORDER NO.	TERMS IF OTHER THAN CREDIT	DATE SHIPPED
PHONED BY	LETTER DATE	PURCHASE ORDER DATE	REQ. NO.		PLANT OR WHSE NO. / MONTH

CODE NUMBER PER TERMS CARD

DRIVER TO COLLE

THIS SHIPMENT $

MSP $

$

COLLECTED ON PRIOR BILLS OR OTHER PRODUCTS

FORM OF COLLE

CURRENCY | COIN

L. Schumert

661 - So. Gerhart

Ft. D.

PREPAID OR COLLECT } IF NOT O. T. OR T. T. PREPAID CHARGES }

ND BY

NO. OF INVOICES	SHOW ORDER NO.	BILL ON CUST. FORM

SPECIAL BILLING INSTRUCTIONS

PART NUMBER	DESCRIPTION	QUANTITY BACK ORDERED	QUANTITY ORDERED AND SHIPPED	UNIT PRICE	EXTENSION	DISCOUNT %	DISCOUNT AMOUNT
15	3 lb. Yen & Tab. Hayfeffit -				1.59		
	+ 1 Tax				.04		
					1.63		

Paid

CWC

CUSTOMER

TOTAL AMOUNT COLLECTED FROM CUSTOMER $

SIGNED THE LINDE AIR PRODUCTS COMPANY

BY

TOTAL CHARGES THIS SHIPMENT $

AMOUNT PAID ON THIS SHIPMENT $

OVER PAYMENT $

UNDER PAYMENT $

SALESMAN

JOBBER

	B		E		B		E		B		
	A		R		A		R		A		
	W		G		W		G		W		
			V				C				
	LX		LJ		LJ		LR		LR		

SHIPMENTS AT BUYER'S RISK. WE TAKE RECEIPT FOR ALL SHIPMENTS IN GOOD ORDER AND ARE NOT RESPONSIB

FRANCIS W. MAXSTADT,

furnishing an affidavit on behalf of the defendant, deposed as follows:

That he is a resident of the City of Pasadena, County of Los Angeles, State of California, and that he is by profession Assistant Professor of Electrical Engineering at the California Institute of Technology; that he is a graduate of Cornell University, and of the California Institute of Technology; that he received the degree of Mechanical Engineer at Cornell University, and subsequently the degrees of Master of Science and Doctor of Philosophy at the California Institute of Technology.

That for the past fifteen years affiant has studied intensively all forms of welding and has designed and built welding machines and practised the art of autogenous welding, both with the metallic electrode arc and the oxy-acetylene blowpipe. That he has since his connection with the California Institute of Technology instructed students in the art of welding both with the electric arc and the oxy-acetylene torch, and has instructed students in the building of apparatus to be used in both electric and oxy-acetylene welding. That during the past fifteen years he has also practised and used both the electric arc and the oxy-acetylene methods of welding.

Affiant further states that for at least fifteen years last preceding this date he has studied the patents affecting the lines of industry in which he has been interested, and in this connection, and also as a patentee, has become accustomed to the reading of patent specifications, drawings and claims and to interpret the same. He has, moreover, in connection with his work in designing equipment for welding by various methods, had frequent occasion to refer to the patent literature and to make searches through collections of patents for the purposes of determining the novelty and infringement of various patents.

(Deposition of Francis W. Maxstadt.)

Affiant further states that he has read the W. F. Stoody, [77] et al. patent No. 1,803,875, the patent here in suit, and understands the same. This patent, entitled, "METHOD OF FACING TOOLS AND RESULTING PRODUCT", was granted May 5, 1931, on the joint application of Winston F. Stoody, Shelley M. Stoody, and Norman W. Cole, assignors to Stoody Company, the plaintiff in this action.

The descriptive portion of the patent in suit is brief. It refers to an accompanying drawing which shows in Fig. 5 a fishtail bit faced with hard material by the method described in the patent; in Fig. 1, a welding rod adapted for use in the method; in Fig. 3, the manner of manipulating the welding rod to form the hard facing; and in Fig. 4 the manner of depositing a supplemental layer of metal upon the hard facing. The specification also refers to two other copending applications and to one issued patent. The welding rod itself, consisting preferably of a mild steel tube filled with particles of tungsten carbide, which is a hard material having a higher melting point then the mild steel of the tube, is stated to be described and claimed in one of the copending applications, Serial No. 250,699, which during the pendency of the patent in suit matured into Patent No. 1,757,601. Patent No. 1,757,601 was adjudicated and held invalid in Stoody vs. Mills, 67 Fed. (2d) 807.

The patent in suit contains nothing describing the manner of applying the hard facing to the tool, except the single sentence (Spec., p. 1, lines 56-60) reading as follows:

> "A layer of metal 5, in which the particles 2 are embedded, is deposited thereon by melting the end of the welding rod by any suitable means such as an acetylene torch indicated at 6."

(Deposition of Francis W. Maxstadt.)

It is also stated (p. 1, lines 76-77):

> "The mild tool steel forms a bond welded or fused on to the face of the tool."

It has been common practice since prior to 1910 to make auto- [78] genous welds with a rod of mild steel or other metal, using an oxyacetylene blowpipe to supply the heat. In the method of the patent, the hard facing is applied by manipulations exactly similar to those which have been standard practice since prior to 1910. The flame is applied to the welding rod and to the surface onto which the metal is to be deposited, exactly as in the prior practice, and the metal of the rod is deposited dropwise as in the conventional procedure, the sole difference being that the hard infusible particles in the rod of the patent are carried by the mild steel to the surface of the tool being hard-faced. This result is inherent in the structure of the rod of the patent. It requires no new manipulations, and could be avoided only with difficulty, if at all, and then by a complete departure from the method universally used.

The claims define a method of associating together a material of low melting point and a material of high melting point, melting the lower melting point constituent and the tool surface by applying heat thus causing the two low melting point materials to weld or fuse together, later solidifying about the high melting point material which is in the form of grains or particles. The claims indicate that particles are not to be altered in character or identity but are to be anchored to the tool surface by the solidified lower melting point material.

Claims 5 and 10 of the patent in suit are typical, and read as follows:

(Deposition of Francis W. Maxstadt.)

"5. The method of facing tools which comprises first associating together a metal of relatively low melting point and pieces of a hard substance of relatively high melting point, supplying heat to the associated mass to cause the metal of low melting point to melt and be deposited on the tool and carry with it the pieces of hard substance depositing them on the tool without materially changing their identity, causing a fusion to take place between the metal of low melting point and the metal of the tool, and allowing the metal of low melting point to cool and harden about the pieces and thus anchor them to the tool." [79]

"10. The method of facing tools which includes associating pieces of an alloy containing tungsten and carbon with a metal of relatively low melting point, simultaneously depositing the alloy and metal on the tool, as by welding, with a heat incapable of melting the alloy to any material extent, causing a fusion to take place between the metal of low melting point and the metal of the tool, and allowing the metal to cool and harden about the alloy and thus anchor the alloy in place."

Claim 5 covers a method of facing tools which may be analyzed as follows:

(1) first associating together a metal of relatively low melting point and pieces of a hard substance of relatively high melting point,

(2) supplying heat to the associated mass to cause the metal of low melting point to melt and be deposited on the tool and carry with it the pieces of hard substance depositing them on the tool

(3) without materially changing their identity,

(Deposition of Francis W. Maxstadt.)

(4) causing a fusion to take place between the metal of low melting point and the metal of the tool, and

(5) allowing the metal of low melting point to cool and harden about the pieces and thus anchor them to the tool.

United States Letters Patent to Chamberlin No. 1,572,349, issued February 9, 1926, completely anticipates claim 5 of the patent in suit. It covers a method of facing tools. The specification of the Chamberlain patent discloses:

(1) first associating together a metal of relatively low melting point and pieces of a hard substance of relatively high melting point,

at lines 78-82, in the following words:

"To insure that the crystals will be at the cutting end of the bit, in another method of manufacture, the crystals are first packed into a capsule of readily fusible material, such as lead, zinc, etc.,"

The specification of the Chamberlin patent discloses:

(2) supplying heat to the associated mass to cause the metal of low melting point to melt and be deposited on the tool and carry with it the pieces of hard substance depositing them on the tool,

at lines 83-88, in the following words: [80]

"* * * and in casting the bit in the mold, either by gravity or pressure, the heat of the cast metal will melt the capsule and the metal of the bit and capsule thereupon flows in around the crystals and binds them together in the end of the bit."

The specification of the Chamberlin patent discloses:

(3) without materially changing their identity,

(Deposition of Francis W. Maxstadt.)

It is well known that carborundum crystals will not melt even at temperatures very much higher than the melting point of the metals used to bind them to the bit; and it is also well known that in this molten metal these crystals will not change their identity. This was recognized by Chamberlin, for he says at lines 46-51 of the specifications:

> "The rotary motion of the drill bit edge against a hard substance, such as rock formation, brings the cutting edges of the carborundum crystals into play against said substance and causes a cutting or boring of the said substance to take place."

and also at lines 85-88, where he says:

> "* * * will melt the capsule and the metal of the bit and capsule thereupon flows in around the crystals and binds them together in the end of the bit."

This is clear recognition on the part of Chamberlin that the carborundum crystals remain intact and do not materially change their identity when subjected to this operation.

The specification of the Chamberlain patent discloses:

> (4) causing a fusion to take place between the metal of low melting point and the metal of the tool,

at lines 83-88, in the following words:

> "* * * and in casting the bit in the mold, either by gravity or pressure, the heat of the cast metal will melt the capsule and the metal of the bit and capsule thereupon flows in around the crystals and binds them together in the end of the bit." [81]

The specification of the Chamberlin patent discloses:

> (5) allowing the metal of low melting point to cool and harden about the pieces and thus anchor them to the tool,

in the same lines 83-88, (supra).

(Deposition of Francis W. Maxstadt.)

Thus it is seen that claim 5 of the patent in suit reads not only in words upon the disclosure of the Chamberlin patent, but in spirit as well.

Claim 10 of the patent in suit covers a method of facing tools which may be analyzed as follows:

(1) associating pieces of an alloy containing tungsten and carbon with a metal of relatively low melting point,

(2) simultaneously depositing the alloy and metal on the tool, as by welding,

(3) with a heat incapable of melting the alloy to any material extent,

(4) causing a fusion to take place between the metal of low melting point and the metal of the tool, and

(5) allowing the metal to cool and harden about the alloy and thus anchor the alloy in place.

Claim 10 of the patent in suit is the same as claim 5, except that it is specifically limited to the use of an alloy of tungsten and carbon. While Chamberlin does not mention a compound of tungsten and carbon as the abrasive material to be used in his bit, nevertheless he states (Spec., lines 15-18):

"* * * an abrasive material, such as carborundum crystals, although other metals and cutting crystals may be used."

and also at lines 34-37:

"These crytals preferably are carborundum crystals of large size although corundum, garnet, alunite, etc., may be utilized in place of the carborundum."

Tungsten carbide was produced by Moissan in 1896 and was used as an abrasive and as a constituent of cutting tools as [82]

(Deposition of Francis W. Maxstadt.)

early as 1914. It was extensively used for hard surfaced cutting tools prior to Stoody's date of conception. In Stoody vs. Mills, 67 Fed. (2d) 807, at page 815, the court found:

> "(2 It was known (in the prior art) that tungsten carbide could be used advantageously in hard surfacing cutting tools."

It required no invention to substitute tungsten carbide for carborundum, since the properties of both were well known and both had been used as abrasives prior to both Stoody and Chamberlin.

All of the other claims held valid and infringed in the case of Stoody v. Mills, In Equity No. Y-101-J, are similar to claims 5 or 10, with minor limitations such as the use of oxy-acetylene welding. Affiant finds that each one of these claims is either completely anticipated by the disclosure of the Chamberlin patent, or in view of the disclosure of Chamberlin contains no invention.

United States Patent No. 604,569, issued to Ringstrom May 24, 1898, anticipates claim 5 of the patent in suit. Ringstrom discloses a method of facing tools. The specification of the Ringstrom patent describes:

> (1) first associating together a metal of relatively low melting point and pieces of a hard substance of relatively high melting point,

at page 1, lines 37-42, in the following words:

> "In carrying out the invention I take fine particles of the abrading material—such as diamond-dust, corundum, carborundum, emery, &c.—and give to each particle or granule

(Deposition of Francis W. Maxstadt.)

of such material a metallic coating. This coating may be applied in several ways."

The specification of the Ringstrom patent discloses:

(2) supplying heat to the associated mass to cause the metal of low melting point to melt and be deposited on the tool and carry with it the pieces of hard substance depositing them on the tool, [83]

at page 1, lines 86-98, in the following words:

"The coated particles are now mixed with the molten metal or alloy, which is to embed them and bind them together. Such metal or alloy may consist of a suitable metal and sulfur, phosphorus, carbon, silicon, or other metalloid. As regards the form of the abrading tool or article, the composition may be cast into the form of disks of different sizes and shapes or be cast on the surfaces of wires or ropes, such as endless ropes for use in cutting stone, &c. It can also be cast on cloth and on the edges of thin metal plates to be used as saw-blades."

The specification of the Ringstrom patent discloses:

(3) without materially changing their identity, at page 2, lines 9-12, in the following words:

"The tool may be sharpened from time to time by this same mode of denudation of the angles or edges of the particles of cutting or abrading material."

This shows that Ringstrom appreciated that the abrading materials, such as diamond-dust, corundum, carborundum, emery, etc., remain intact at the temperature necessary to bind them to the tool, and their identity is not materially changed.

(Deposition of Francis W. Maxstadt.)

The specification of the Ringstrom patent discloses:

(4) causing a fusion to take place between the metal of low melting point and the metal of the tool,

at page 1, lines 86-89, in the following words:

"The coated particles are now mixed with the molten metal or alloy, which is to embed them and bind them together."

and also at p. 2, lines 96-98:

"It can also be cast on cloth and on the edges of thin metal plates to be used as saw blades."

The specification of the Ringstrom patent discloses:

(5) allowing the metal of low melting point to cool and harden about the pieces and thus anchor them to the tool.

at page 1, lines 96-98, in the following words: [84]

"It can also be cast on cloth and on the edges of thin metal plates to be used as saw blades."

The casting process is not completed until the metal has cooled, and Ringstrom clearly shows that in this cooling process the pieces are firmly anchored to the tool.

While Ringstrom does not specifically mention tungsten carbide, he does not limit himself to the abrading material mentioned in the patent.

With the exception of tungsten carbide as an abrading material, the Ringstrom Patent anticipates claim 10 of the patent in suit, and no invention was required to substitute tungsten carbide for one of the abrading materials mentioned in the patent in suit.

Affiant finds that all of the claims held valid and infringed by the court in Stoody v. Mills, In Equity Y-101-J, are either antici-

(Deposition of Francis W. Maxstadt.)

pated by Ringstrom, or in view of the disclosure in the Ringstrom patent are invalid for lack of invention.

The German Patent to Siemens & Halske No. 427,074, issued March 23, 1926, is for a "METHOD FOR THE PREPARATION OF ALLOYS FOR IMPLEMENTS (TOOLS, ETC.)". This patent discloses that if tungsten carbide in the form of grains or fragments is added to molten iron or other metals, the tungsten carbide will become merely embedded in the metal, and there will be no material change in the identity of the carbide. Page 2, lines 7-11 of the patent, as correctly translated, reads as follows:

> "It appears that the tungsten carbide completely dissolves in the cobalt-chromium alloy and a perfectly homogeneous mass is obtained. With many other metals, the carbide is merely embedded. The advantages and disadvantages are governed in each case by the particular intended use."

This patent clearly shows that tungsten carbide may be embedded in molten steel without difficulty and that it can be substituted without difficulty or change in procedure for the car- [85] borundum or other abrasive materials mentioned in the Chamberlin and Ringstrom patents.

The British Patent No. 27,954, of 1908, to Morrison, is for a method of applying a hard surface to cutting tools. Morrison describes in detail the accepted and conventional practice of fusing and autogenously welding a rod of harder metal onto the surface of a bit. He also states (page 2, lines 25-34):

> "But should I eventually find the results as regards hardness, toughness, or the like, to be not just what is required for the special purpose in view, owing to the high grade steel alloy immediately at hand, not being of precisely suitable

(Deposition of Francis W. Maxstadt.)

> character, I vary the result by so applying the extremity of the high grade steel while in a state of semi-fusion, to small particles of such metal, or metals or their oxides, (as nickel, tungsten, chromium, manganese, and the like) that a little of such metal, or metals, or their oxides, may adhere thereto. I then fuse on to my armoured nosing fresh drops of the thereby reinforced high grade steel alloy, * * *."

This is a complete disclosure of the associating of materials of higher melting points with a steel welding rod and applying heat by an oxy-acetylene torch to the associated mass sufficient to melt the steel welding rod and form a bond with the tool. The final character of the facing is determined by the properties of the materials which are associated with the welding rod. Tungsten carbide was not known commercially at the time of Morrison's disclosure. It would require no invention, however, in practicing Morrison's method, to utilize tungsten carbide in lieu of the reinforcing materials which Morrison specifies.

The Morrison patent discloses completely what has been referred to in the Stoody-Mills litigation as the "hot rod method".

Those claims of the patent in suit which were held valid in Stoody v. Mills, In Equity No. Y-101-J, are all essentially similar in scope. Some of them, for example claims 5, 6 and 12, de- [86] fine the embedded hard substance of high melting point in broad terms. Others, such as claim 6, specify that this substance is "a tungstic material", while others, e. g. claim 10, are still more specific and require the presence of both tungsten and carbon in the embedded material.

The broader claims are completely anticipated by the Chamberlin patent alone, and by the Ringstrom patent alone. To employ tungsten carbide as the hard embedded material of high

(Deposition of Francis W. Maxstadt.)

melting point is entirely obvious in view of German Patent 427,074, and it was specifically found as a fact in Stoody v. Mills, 67 Fed. (2d) p. 814,—

> "It was known that tungsten carbide could be used advantageously in hard surfacing cutting tools".

Any skilled operator of the acetylene torch, applying the ordinary technique of autogenous welding to the welding rod covered in the Stoody patent 1,757,601, would inevitably carry out the method claimed in the patent in suit. Accordingly, each of the claims here under consideration is devoid of patentable novelty.

Copies of the patents to Chamberlin No. 1,572,349; Ringstrom No. 604,569; German Patent No. 427,074, to Siemens & Halske, (and a correct translation thereof,); the British Patent No. 27,954 to Morrison, and Stoody, et al. Patent No. 1,757,601, are attached hereto, marked respectively Exhibits 1, 2, 3, 3-a, 4 and 5, and made a part of this affidavit.

EXHIBIT No. 1

Feb. 9, 1926. 1,572,349

J. R. CHAMBERLIN

ROTARY CORE DRILL BIT

Filed June 19, 1922

Fig. 1

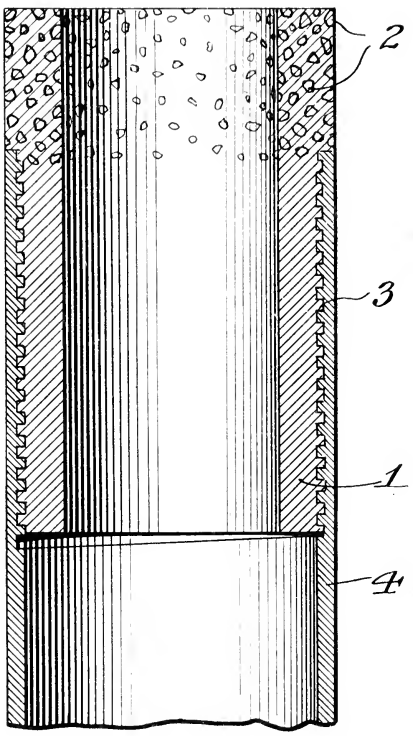
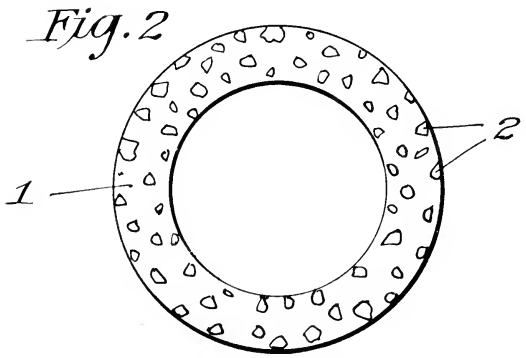


Fig. 2



John R. Chamberlin Inventor

By his Attorney

Brake & Hackley & Kenyon

UNITED STATES PATENT OFFICE.

JOHN R. CHAMBERLIN, OF BRONXVILLE, NEW YORK.

ROTARY-CORE DRILL BIT.

Application filed June 19, 1922. Serial No. 569,356.

o all whom it may concern:

Be it known that I, JOHN R. CHAMBERLIN, citizen of the United States of America, siding at Bronxville, in the county of estchester and State of New York, have vented certain new and useful Improvents in Rotary-Core Drill Bits, of which e following is a full, clear, and exact deiption.

The present invention relates to rotary e drill bits.

The object of the invention is to provide drill bit of a suitable material such as minum or an alloy thereof and in which ncorporated in its cutting end an abrae material, such as carborundum crystals, hough other metals and cutting crystals y be used.

By way of illustration I have shown one m of my invention in the accompanying wings in which:

Figure 1 is a vertical section of a rotary e drill bit, and Figure 2 is a plan view reof.

Referring to the drawings, 1 is the rotory e drill bit preferably of aluminum or an y thereof, although it may be made of l, copper, bronze, etc., in which a quan- of cutting crystals 2, is incorporated he cutting end of said bit, a relatively metal forming a perfect binding agent filling all voids between the crystals, hout impairing the tensile strength of bit. These crystals preferably are carndum crystals of large size although ndum, garnet, alunite, etc., may be utiil in place of the carborundum. At 3 rew thread connection is shown with a barrel 4 which in the usual practice of ling is connected with suitable rotating rods (not shown).

drilling operations, the drill rods are en from a suitable source of power and e drill rods in turn rotate the core barland the rotary core drill bit mounted eon. The rotary motion of the drill edge against a hard substance, such as formation, brings the cutting edges of carborundum crystals into play against substance and causes a cutting or bor- the crystals first exposed and the met holding them in position, whereupon t crystals in the rear of those first expos will come into play and take their place cutting or boring agents in the boring o eration. This will continue until the bit is worn down to a point where the cuttii crystals are all used up, whereupon a ne bit 1 is substituted for the old one and tl boring operation resumed, all in the usu manner.

In the manufacture of my new bit, prefer to use a metal such as aluminum, one of its alloys, as the metal of the bit ar to use corborundum crystals of large si as the cutting material, as said metal metals are lighter than the carborundu and in casting of the bits where the ca borundum crystals are first put in the bo tom of the mold there is less tendency fc the crystals to float toward the top of tl bit. This insures that the maximum nun ber of crystals will be at a point in the b where they can be all availed of in the cu ting or boring operation.

To insure that the crystals will be at th cutting end of the bit, in another method c manufacture, the crystals are first packe into a capsule of readily fusible materia such as lead, zinc, etc., and placed in th bottom of the mold, and in casting the bi in the mold, either by gravity or pressur the heat of the cast metal will melt the cap sule and the metal of the bit and capsul thereupon flows in around the crystals an binds them together in the end of the bit

By virtue of the construction of rotar core drill bits above described, drilling op erations through rock formation are carrie on in circulating water at higher speeds o rotation than heretofore customary.

What I claim is:

1. A rotary core drill bit comprising a aluminum tube and cutting crystals incor porated only in one end thereof.

2. A rotary core drill bit comprising a aluminum tube and carborundum crystal incorporated in one end thereof.

In testimony whereof I hereto affix my

EXHIBIT No. 2
Sheets 1 and 2

(No Model.)

A. V. RINGSTRÖM.

GRINDING, ABRADING, OR CUTTING MATERIAL AND MODE OF PREPARING SAME.

No. 604,569. Patented May 24, 1898.

Fig. 1.

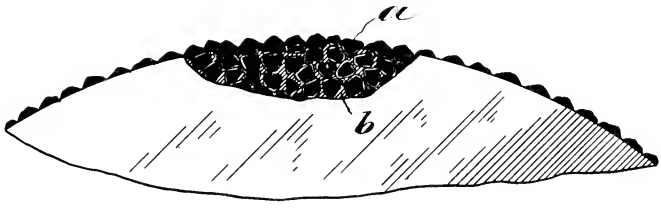


Fig. 2.

WITNESSES:

F. W. Hinman

Peter A. Ross

INVENTOR

August V. Ringström

BY

Munn & Co.

GUST VILHELM RINGSTRÖM, OF ÖREBRO, SWEDEN, ASSIGNOR TO NIL EYVIN FRYKHOLM, OF STOCKHOLM, SWEDEN.

GRINDING, ABRADING, OR CUTTING MATERIAL AND MODE OF PREPARING SAME.

SPECIFICATION forming part of Letters Patent No. 604,569, dated May 24, 1898.

Application filed December 26, 1895. Serial No. 573,393. (No model.)

all whom it may concern:

Be it known that I, AUGUST VILHELM RINGSTRÖM, a subject of the King of Sweden and way, and a resident of 34 Storgatan, Örebro, in the Kingdom of Sweden, have invented certain new and useful Improvements in nding, Abrading, or Cutting Materials and he Mode of Preparing the Same, of which following is a specification.

his invention relates to the class of compositions for grinding, abrading, cutting, or shing wherein the abrading material in or pieces is united in a mass of the proper n by means of metal used as a binding nt. Heretofore, so far as I am aware, this le has been applied only in making millstones, where relatively large bits or pieces mery have been united or joined in a mass simply pouring over or among them al—as zinc, for example—which has a comatively low melting-point. My invention s not employ the abrading material in rse bits or pieces, but in fine particles, like l, and it has been found impracticable a mass of such fine material to unite all he particles to each other with molten al by simply mixing the latter with the icles of abrading material. To overcome difficulty and to provide a cutting or ading surface on the article or tool is the ct of the present invention, which con, essentially, in first coating each particle rain of the abrading material with metal, mixing the coated particles with molten al or metallic alloy, and then casting the s to give it the proper form.

carrying out the invention I take fine pars of the abrading material—such as diad-dust, corundum, carborundum, emery, —and give to each particle or granule of material a metallic coating. This coatmay be applied in several ways. For exle, the abrading material may be placed suitable solution of a metallic salt, to h a reducing agent is added—for ince, a solution of oxid of silver in ammoto which is added a reducing agent, as e-sugar, tartaric acid, &c.—or a coating netal may be applied mechanically—for nple, by first coating the particles or ules of the abrading material with some refractory adhesive substance (as "water glass," so called) and then coating the particles with powdered metal or metal-dust which latter is caused to adhere to the particles by the water-glass. This may be effected by putting the particles of abrading material in a mixing-drum with a sufficient quantity of the water-glass to cover them, then adding to the mass a sufficient quantity of the metal-dust, and then shaking or agitating the mass until the particles are all thoroughly coated. The metallic coating, however applied, will be a mere film, very thin; but it will have sufficient strength to answer the purposes intended if the metal used for binding or connecting the particles in forming the tool or article has a lower melting-point than the coating metal and does not readily alloy with the latter. Otherwise the coating or film of metal on the particles must be strengthened by applying a thicker coating, according to the well-known electroplating process or by electroplating alone, in which case the particles or granules of abrading material will be first coated with graphite, manganese peroxid, &c., in lieu of metallic dust. This electroplating may be conveniently effected by first covering the particles of abrading material with a conducting coating or film, as explained, and then immersing them in a suitable metallic-salt bath—for instance, an alkaline copper-salt bath—wherein they are allowed to come in contact with the electropositive metal, as zinc. This will give them a coating of copper. The coated particles are now mixed with the molten metal or alloy which is to embed them and bind them together. Such metal or alloy may consist of a suitable metal and sulfur, phosphorus, carbon, silicon, or other metalloid. As regards the form of the abrading tool or article, the composition may be cast into the form of disks of different sizes and shapes or be cast on the surfaces of wires or ropes, such as endless ropes for use in cutting stone, &c. It can also be cast on cloth and on the edges of thin metal plates to be used as saw-blades. After the compound has been cast the points or cutting edges of the particles of abrading material are exposed or denuded by removing the metal covering them along the cutting

urface of the tool, and this may be done airly well by grinding away the metal with harp sand mixed with water or oil, but preferably by dissolving the metal away with cids or corrosive chemicals; or if the binding metal be an electropositive one, as zinc, his denudation of the particles may be affected by galvanism in a well-known manner. The tool may be sharpened from time to time by this same mode of denudation of the angles or edges of the particles of cutting or abrading material.

In the accompanying drawings, which illustrate the invention, Figure 1 is an enlarged or magnified fragmentary view of a part of a ool constructed according to my invention; nd Fig. 2 is a view on a similar scale, showng some of the metal-coated particles or granules before being bound together by the embedding metal.

In the views, *a* represents the coated granules of abrading material, and *b* the binding or imbedding metal.

Having thus described my invention, I claim—

1. The herein-described method of pre ing abrading materials which consists in applying to the separate, fine grains of a h abrading material, as corundum, a coatir metal, then mixing said coated grains molten metal, and then shaping said mix into suitable forms for use.

2. As an improved article of manufact an abrading or cutting tool having its sur composed of a mass of fine particles or g ules of hard abrading material, each co with a film or metal, and an embeddin binding metal about and among said g ules, the binding metal having a lower r ing-point than that of the metal with w the granules are coated, substantially a forth.

In witness whereof I have hereunto sig my name in the presence of two subscri witnesses.

AUGUST VILHELM RINGSTR

Witnesses:
ERNST SVANGVIST,
CARL TH. SUNDHOLM.

DEUTSCHES REICH

AUSGEGEBEN AM
23. MÄRZ 1926

REICHSPATENTAMT

PATENTSCHRIFT

№ 427074

KLASSE 40b GRUPPE 17

(S 59317 VI/40b)

Siemens & Halske Akt.-Ges. in Berlin-Siemensstadt*).

Verfahren zur Herstellung von Legierungen für Geräte (Werkzeuge usw.).

Patentiert im Deutschen Reiche vom 25. März 1922 ab.

Gemäß vorliegender Erfindung werden Gegenstände, die besonders große Härte haben sollen, aus Wolframkarbid dadurch hergestellt, daß das Wolframkarbid einem Metall oder einer Metallegierung einverleibt wird. Das Metall oder die Legierung wird geschmolzen und das Wolframkarbid in feiner Verteilung oder auch in Form von Körnern eingetragen.

Als Trägermetall kann beispielsweise irgendein weiches Metall dienen, wie Kupfer, Silber, Blei o. dgl. Es können aber auch Metalle oder Legierungen, wie Eisen, Nickel, Kobalt, verwendet werden. Besonders geeignet ist eine Legierung, die aus Kobalt und Chrom besteht. Gerade solche Kobalt-Chrom-Legierungen nehmen das Wolframkarbid sehr gut auf und ergeben ein Material von vorzüglichen Eigenschaften. Die Härte wächst mit dem Wolframkarbidgehalt. Gleichzeitig nimmt allerdings die Zähigkeit der Legierung mit steigendem Karbidgehalt ab. Man wird von Fall zu Fall, je nach den verlangten Eigenschaften der Legierung, den Karbidgehalt zu wählen haben. Bereits mit 1 Prozent Karbidzusatz bekommt man eine sehr beachtliche Härtesteigerung; bei Zusätzen von 10 bis 15 Prozent hat man eine Legierung, die den besten gehärteten Stahl weit übertrifft und gleichwohl noch hervorragende Zähigkeit besitzt. Selbst bei 20 Prozent Zusatz bekommt man noch eine Legierung, die für sehr viele Zwecke, auch z. B. für W zeuge zur Bearbeitung von Metall oder S geeignet ist. Geht man wesentlich da hinaus, so wird im allgemeinen das Ma zu spröde.

Die Legierung von Kobalt und C kann in ihrer Zusammensetzung inne weiter Grenzen variieren; man kann ungefähr gleiche Teile nehmen, besser aber i auf etwa 2 Teile Chrom ungefähr 3 Kobalt zu nehmen.

In der Kobalt-Chrom-Legierung schein das Wolframkarbid vollständig aufz und man bekommt eine vollkommen h gene Masse. Bei manchen anderen Me handelt es sich nur um eine Einbettung. Vorzüge und Nachteile sind in jedem E fall durch den besonderen Verwendungsz bedingt.

In welcher Form das Wolframkarb dem fertigen Körper enthalten ist, naturgemäß von den angewendeten Me end von den angewendeten Karbidm und von mancherlei sonstigen Umständ Es bilden sich unter Umständen binäre ternäre Karbide, ohne daß die guten E schaften des Körpers dadurch beeinträ werden.

Es ist bekannt, Wolframmetall nich zu Eisen, sondern auch zu Chrom-K Legierungen zuzusetzen, und es ist au kannt, daß z. B. kohlenstoffhaltige Wo

Chrom-Kobalt-Legierungen sehr hart sind. Es ist aber nicht bekannt, in solche Legierungen Wolframkarbid einzutragen. Die Härte der Kobalt-Chrom-Legierungen läßt sich so entsprechend dem Gehalt an Wolframkarbid steigern und einstellen.

Patent-Ansprüche:

1. Verfahren zur Herstellung von Legierungen für Geräte (Werkzeuge usw.) von sehr großer Härte, dadurch gekennzeichnet, daß Wolframkarbid in ein zenes Metall oder eine Metallleg getragen wird.

2. Anwendung des Verfahren spruch 1 zur Herstellung von gen aus Chrom, Kobalt, W Kohlenstoff, dadurch gekennze in die geschmolzene Chrom K rung aus einem Teil Chrom 2 Teilen Kobalt 1 bis 20 Pr ramkarbid eingetragen werden

(Deposition of Francis W. Maxstadt.)

EXHIBIT 3-A.

TRANSLATION OF GERMAN PATENT No. 427,074

Date: March 25, 1922
Issued: March 23, 1926
Patentee: Siemens & Halske Akt.-Ges. in Berlin-Siemensstadt

Title: METHOD FOR THE PREPARATION OF ALLOYS FOR IMPLEMENTS (TOOLS, ETC.)

In accordance with the present invention, objects which are to have great hardness, are made from tungsten carbide by embodying the tungsten carbide into a metal or a metal alloy. The metal or the metal alloy is melted and the tungsten carbide is embodied in finely distributed form or else in the form of grains.

The carrier metal may be any soft metal such as for instance copper, silver, lead or the like. However, other metals or alloys such as iron, nickel, or cobalt may be used. Particularly suitable is an alloy which consists of cobalt and chromium. Such cobalt-chromium alloys take the tungsten carbide very well and result in a metal of excellent properties. The hardness increases with the contents of tungsten carbide. At the same time however the toughness of the alloy decreases with increasing carbide contents. The carbide percentage will have to be determined from case to case in accordance with the properties desired. Even the addition of only one percent carbide results in a very noticeable increase in hardness; when using additions of from ten to fifteen percent, an alloy is obtained which far surpasses the best hardened steel and still is of excellent toughness. Even at an addition of twenty percent, an alloy is obtained which is suitable for many purposes such as for instance for tools used

(Deposition of Francis W. Maxstadt.)

for working on metal or [94] stone. If the aforesaid percentag is substantially exceeded the metal gets too brittle as a rule.

The cobalt-chromium alloy may vary in its composition with wide ranges; it is possible for instance to take approximatel equal parts of cobalt and chromium, however it is better to tak about three parts of cobalt and two parts of chromium.

It appears that the tungsten carbide completely dissolves i the cobalt-chromium alloy and a perfectly homogeneous mass obtained. With many other metals, the carbide is merely en bedded. The advantages and disadvantages are governed i each case by the particular use of the substance.

The form in which the tungsten carbide is contained in th finished substance naturally depends upon the metals used, also depends upon the quantity of carbide used and upon variou other circumstances. Under certain circumstances, binary c ternary carbides are formed without impairing the good pro erties of the substances.

It is known to add metallic tungsten not only to iron but als to chromium-cobalt alloys and it is furthermore known tha carbon-containing tungsten-chromium-cobalt alloys are very har It is not known, however, to embody tungsten carbide in suc alloys. The hardness of the cobalt-chromium alloys may b increased and regulated in proportion to the contents of tungste carbide.

CLAIMS

1. Method for the preparation of alloys for implements (tool etc.) having great hardness, characterized by the fact that tun sten carbide is embodied into a molten metal or metal allo [94½

2. The use of the method as per claim 1 for the preparatio of alloys made of chromium, cobalt, tungsten and carbon, cha

(Deposition of Francis W. Maxstadt.)

acterized by the fact that from one to twenty percent of tungsten carbide are embodied into the carbon chromium-cobalt alloy consisting of one part of chromium and of from one to two parts cobalt. [95]

EAL*CAC

N° 27,954 A.D. 190[illegible]

Date of Application, 8th June, 1909 —Accepted, 13th Jan., 1910

COMPLETE SPECIFICATION.

Improvements in the Manufacture of Tools for Metal Working, Shea[illegible] and the like through the Agency of the Oxy-acetylene Blow and the like.

I, ERNEST ROLAND MORRISON, Engineer, at present residing at Ashl[illegible] Elmfield Park, Gosforth, Newcastle on Tyne, do hereby declare the natu[illegible] this invention and in what manner the same is to be performed, to be particu[illegible] described and ascertained in and by the following statement:

My invention relates to a new process of armouring the cutting or wor[illegible] edges of machine tools and the like, by uniting expensive varieties of ste[illegible] cheaper qualities of steel or iron, or by varying the quality of the part[illegible] stituting the working or cutting edge. This has been proposed to be don[illegible] electric heating or welding, and by fusion welding with copper. But accor[illegible] to my invention, it is done by autogenous fusing or welding by means o[illegible] oxy-acetylene and the like blowpipe, a process which is well known for [illegible] purposes.

I am fully aware of already existing methods of joining or compoun[illegible] irons and steels by:—

(*a*) soldering or brazing, as described by Patent 352/1908 (Viallon),

(*b*) impact or pressure at welding temperatures, as detailed in the follo[illegible] Patents:—Mills 354/1876; Telford 4675/1890; Bingham 4036/1894; Ki[illegible] 8683/1906; Eadon 3678/1907; and Ludwig 20,417/1907, and by

(*c*) fusion with copper or aluminium strips interposed between the parts[illegible] joined, as set forth in the Simpson Patents 86/1907, and 16,879/1907.

I am also cognisant of the already existing method of face-hardening m[illegible] by electricity as described in Spencer's Patent 13,565/1896, and of a[illegible] known method of mending cracks in cast iron with the oxy-hydrogen blow[illegible] as specified in the Magnus Patent 16,647/1905, and by the unpatented me[illegible] of doing the same thing with the oxy-acetylene blowpipe.

But as the two last named blowpipe operations solely deal with repai[illegible] fractured iron castings, or the welding of cast iron to cast iron, they d[illegible] bear upon the matter. For seeing that my invention on the contrary ap[illegible] to the welding or compounding together of cheap irons (wrought or cast[illegible] of mild steels with more expensive tool, or "high grade" steels, having a[illegible] specific object the more economical production or armouring of cutting[illegible] and implements than has hitherto been accomplished, the objects in view[illegible] perfectly distinct.

My ordinary method of working is firstly to fix upright in a vice, the[illegible] of ordinary mild steel, or wrought or cast iron, upon the upper end, edg[illegible] portion, of which I wish to operate. Secondly to take in my left hand a[illegible] of high grade or tool steel (grasped if necessary within a pair of tongs)[illegible] hold it immediately over the other. Thirdly, to take in my right hand, an[illegible] acetylene blowpipe, and to apply the hottest part, or the inner white cone[illegible] of its flame simultaneously to the upper end of the mild steel or iron, and[illegible] lower end of the high grade steel, for a few seconds until both are in a[illegible] of semi-fusion. Then I momentarily direct the flame more particularly t[illegible] highly heated end of the high grade steel, until it is so completely fuse[illegible]

liquefied, that portions of it drop away on to the other, and form a comp
weld.

The *modus operandi* is somewhat analogous to heating a piece of sealing
in an ordinary gas jet, and dropping melted portions upon the document t
sealed. And I continue adding fused drops of the high grade steel, unt
obtain the thickness or depth of armoured nosing on the piece of mild stee
iron which I desire. Finally, laying aside the unused portion of the piec
high grade steel, I well fuse with my blowpipe the newly armoured nos
until a thoroughly incorporated and homogenous weld is secured.

Or I can vary the first operation when so desired, by fusing or weld
together homogenously a length of high grade steel, and one of ordinary m
steel or iron.

In this case I first chamfer or V the edges to be joined, by grinding d
on an emery wheel, or by other convenient means. I then lay the two pi
upon a slab of firebrick or other refractory material, with the parts to be wel
together placed in contact or in close proximity. And after fusing toget
with my blowpipe (turning the pieces round for this purpose as may be necess
after finishing each side) I fill up any hollows or interstices left, by fus
into them drops of mild steel or iron, preferably in the form of wire, sticks
rods, from one eighth to three sixteenths of an inch in thickness.

I then finally work my blowpipe back and forward across the weld u
thorough incorporation is secured. And when the job has cooled off, I fi
on an emery wheel, or in some cases before cooling off, I hammer all ro
the weld while still in a semi-plastic state.

But should I eventually find the results as regards hardness, toughness,
the like, to be not just what is required for the special purpose in view, ow
to the high grade steel alloy immediately at hand, not being of precisely s
able character, I vary the result by so applying the extremity of the high gr
steel while in a state of semi-fusion, to small particles of such metal, or me
or their oxides, (as nickel, tungsten, chromium, manganese, and the li
that a little of such metal, or metals, or their oxides, may adhere thereto.
then fuse on to my armoured nosing fresh drops of the thereby reinforced h
grade steel alloy, and finally well fuse all round the completed nosing u
thorough and homogeneous incorporation is secured

Having now particularly described and ascertained the nature of my s
invention, and in what manner the same is to be performed, I declare that w
I claim is the manufacture of tools for metal working, shearing, cutting,
the like, by:—

1. The armouring of mild steel, and wrought or cast iron, by welding
fusing autogenously on to the same, by means of the oxy-acetylene and the
blowpipe, in the manner described under "my ordinary method of workin
of molten drops of high grade and expensive steels.

2. The modification of my ordinary method of working as described un
the words "I can vary the first operation when so desired," and

3. The amplification of either 1 or 2 (where the result does not fully meet
tool requirements) by the method set forth in the paragraph beginning "
should I eventually find the result as regards hardness, toughness, or the lik

Dated this Twenty-first day of December, 1909.

ERNEST R. MORRISON

Redhill: Printed for His Majesty's Stationery Office by Love & Malcomson, Ltd.—1910

EXHIBIT No. 5

May 6, 1930. W. F. STOODY ET AL 1,757,601

WELDING ROD

Filed Jan. 30, 1928

Fig. 1.

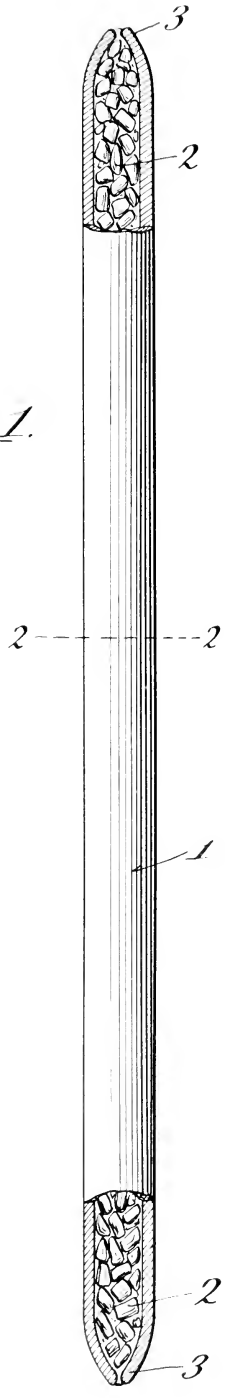
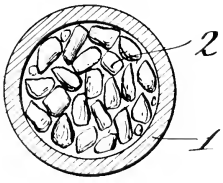


Fig. 2.



Inventors.
Winston F. Stoody.
Shelley M. Stoody.
Norman W. Cole.
by Hazard and Miller
Attorneys

UNITED STATES PATENT OFFICE

WINSTON F. STOODY, SHELLEY M. STOODY, AND NORMAN W. COLE, OF WHIT
CALIFORNIA, ASSIGNORS TO STOODY COMPANY, OF WHITTIER, CALIFORN
CORPORATION OF CALIFORNIA

WELDING ROD

Application filed January 30, 1928. Serial No. 250,697.

Our invention relates to a welding rod, and it is an object of this invention to provide a simple and efficient welding rod in the shape of a tubular container consisting of mild steel or other metal alloy of a comparatively low melting point, said tubular welding rod containing particles or pieces of a material or an alloy of exceptional hardness and toughness suitable for facing cutting, drilling and boring tools.

Our invention consists of the construction and arrangement of parts hereinafter described and claimed.

Referring to the accompanying drawings forming a part of this specification,

Figure 1 is an elevation partly in section, of a welding rod embodying our invention.

Fig. 2 is a horizontal section taken on the line 2—2 of Fig. 1.

In the drawings, 1 indicates a tube made of mild steel or any other metal or alloy having a comparatively low melting point such as mild steel. The tube 1 is filled with broken pieces or particles 2 of an alloy, carbide or element such as black diamonds of great hardness and toughness; but we prefer to use an alloy set forth in our copending application for an alloy, containing tungsten and carbon, Serial No. 250,699 filed January 30, 1928. The ends of the tube 1 are preferably pinched together as at 3 so as to confine the particles within the tube.

In the use of the welding rod the tools are faced with a layer or skin of mild steel or metal of which the tube 1 is composed, in which layer the particles or pieces 2 are embedded. We prefer to use an acetylene torch in melting the welding rod. The particles 2 of the alloy or element having a considerable higher melting point than the mild steel of which tube 1 is composed, will not be affected by the acetylene torch. The metal of the is then provided with a surface layer hard tool steel, though the second lay metal may be omitted. The method a sulting product of such facing of tools scribed and claimed in our copending cation, filed January 30, 1928, Serial No. 698. The second layer of hard tool stee be omitted, and the particles 2 embedd the metal of the welding rod deposited face of the tool, may be used without th ond layer of metal, and will produce go sults.

Various changes may be made in the struction and arrangement of parts o welding rod, without departing fron spirit of our invention as claimed.

We claim:

1. A welding rod comprising a tubula tainer closed at one end and made of steel, and pieces of a hard alloy hav higher melting point which will not be s terially affected by a welding temperat to lose its original identity and mix wit mild steel, contained in said container.

2. A welding rod comprising a tubula tainer made of a metal of a compara low melting point and pieces of an allo taining tungsten and carbon within sai tainer.

3. A welding rod comprising a me comparatively low melting point, and of an alloy containing tungsten and c associated therewith.

4. A welding rod comprising a gra tungsten carbide surrounded by a me comparatively low melting point.

5. A welding rod comprising a gra mass of an alloy containing tungsten an bon inclosed within a metal of compara low melting point, the particles of the being of such size that they will not be pletely melted or mixed with the met

inclosed within a metal of comparative-
v melting point, the particles of the al-
eing of such size that they will not be
letely melted or mixed with the metal
: a welding temperature.
A welding rod comprising a mass of
ılar tungsten carbide held together in
ke form by a metal of comparatively low
ng point.
testimony whereof we have signed our
s to this specification.

WINSTON F. STOODY.
SHELLEY M. STOODY.
NORMAN W. COLE.

During the proceedings had before the Court on said motio for temporary injunction, there were introduced in evidence b defendant the following patents, copies of which are at this poin incorporated herein:

British Patent to Spencer No. 13,565 of 1896;

U. S. Patent to Jones No. 1,387,157;

U. S. Patent to Mills No. 1,650,905;

U. S. Patent to Wyckoff, et al., No. 529,990. [100]

COMPLETE SPECIFICATION.

Improvements in Face Hardening Metals.

I, JOHN WATSON SPENCER of Newburn, Newcastle-on-Tyne, in the County of Northumberland, Steel Manufacturer, do hereby declare the nature of this invention and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement :—

With the object of obtaining articles made in metals, especially those made of iron or steel, having particular parts or surfaces of various degrees of hardness that may be desired while the remaining portion of the object, if so desired, is of a mild or ductile nature, I weld or fuse onto the parts or surfaces so to be hardened a coating of metals or their alloys (including carbon or other of the non metallic elements or their combinations) of any desired form or thickness and of such a nature that any varying degree of hardness up to the maximum may be obtained.

Such a coating material may be composed of (for instance) an alloy of chromium iron and carbon, and is readily united with the softer steel and forms a surface which can receive intense hardness when hardened, or other suitable material dependent on the particular purpose for which finished article is destined.

This may be effected either by means of the electric arc or by means of the heating effect due to the resistance offered to the passage of an electric current by the substances to be so united.

The operation may be performed by electrically connecting the article to be operated upon with the source of the electric energy so that it shall form one pole of the circuit, while the other pole is formed of a carbon pencil in electric communication with the other terminal of the generating apparatus. In this manner an electric arc may be struck between the carbon pencil and any desired part or surface of the article which forms the other electrode, the part or surface so acted upon being fused or melted under the influence of the heat generated by the passage of the electric current across the intervening space. The hard material which is to be welded on is then gradually added in such quantity as may be required and fused under the arc to the parts previously fused and that have to be face hardened, or the portions to be hardened may have the hard metal or alloy in a fluid state poured over their surface while they are in a state of fusion.

Or again the article may be locally heated by being made to form part of an electric circuit so that the heat induced by the resistance offered to the passage of the electric current may raise the temperature to the required point when the metal or alloy, previously melted in a crucible or furnace, may be flowed over the surface.

Articles so treated may afterwards be hardened or tempered by any of the known processes which may be found to be most suitable or convenient without interfering with the soft and ductile parts of the articles which have not been so acted upon.

In either case it is important that the adjacent surfaces of the parts to be united should be perfectly clean and free from scale or other extraneous matter, and this may be secured by the use of a suitable fusible flux to protect the surfaces from the oxydizing influence of the atmosphere and also remove any scale that may have been formed, while the parts can be hammered or pressed together in order to consolidate the material and secure a sound and homogeneous weld.

By this process a coating of intense hardness may be obtained as forming part of the more ductile material of which an object may be made without in any way reducing the ductility of

The relative intensity of hardness and degree of softness of the combined me may also be readily modified to suit any particular requirement.

Many of the hardest metals and their alloys are most refractory and cann fused or welded on to iron or steel or other metals by the processes ordina employed, but this process enables numerous and various combinations to formed.

The welding or fusing energy of the electric arc may be applied by mean what is known as the "Barnado" process or by other suitable means.

Such combinations of metals produced as herein set forth can be trea mechanically, if necessary, by forging, rolling or other process to reduce or otl wise modify the thickness or relative thickness of the combined metals, as instance in the production of thin plates for use as protective coverings for sh torpedo boats or for other use where a ductile plate with a hardened surf is needed.

The uses and applications of my improvements in face hardening metals are v numerous, as for instance to dies for the stamping of metals *etc.*, stamps for crush quartz or any of the metallic ores or other hard substance, ball or other bearin punches, shear blades, drills and tools intended for the cutting and shaping metals or for any tool or appliance which requires a hard face, surface or edge order to resist the destructive action due to the rapid cutting or wearing of surface being operated upon.

If the whole or a considerable portion of a stamp for instance be made of degree of hardness requisite to resist such cutting and wearing actions as accomps the processes generally employed in dealing with hard steel as used for st purposes it is found that the metal which forms that portion of the stamp is rende brittle and unadapted to afford the requisite resistance to the sudden and sev stresses to which it is liable.

By treating the stamp however in the manner already described that port only which is subjected to the more direct action of the substance being opera upon is covered or coated with a skin of extremely hard material, able to resist detrusive action of the hardest substance, while it is backed up and supported a tougher and more ductile material.

Having now particularly described and ascertained the nature of my said inv tion, and in what manner the same is to be performed, I declare that wha claim is :—

1. The improved method of face hardening metals or obtaining surfaces or p of objects made in metals, especially of iron or steel, of degrees of hardness vary from other parts thereof, which consists in welding or fusing upon bodies of s metals, coatings of metals or their alloys (including carbon or other of the n metallic elements or combinations) by the aid of the electric arc, or other suita means of applying the welding or fusing properties of electrical energy, substanti as and for the purposes hereinbefore set forth.

2. The hereinbefore described method of case hardening metals or produc varied degrees of hardness between the surfaces and the interior of metallic bod by electrically welding or fusing onto the body of metal a coating or coating such metal or the substances herein stated ready for further treatment, as and the purpose stated.

Dated the 16th day of March 1897.

WM. BROOKES & SON,
55 & 56 Chancery Lane, London, Agents for the Applica

London Printed for Her Majesty's Stationery Office, by Darling & Son Ltd.—1897

E. H. JONES.

WELDING AND BRAZING.

APPLICATION FILED SEPT. 18, 1918.

1,387,157. Patented Aug. 9, 1921.

FIG. 1.

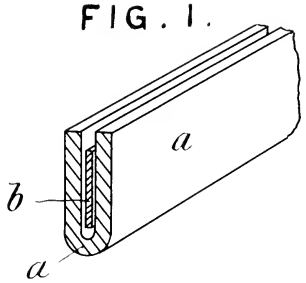


FIG. 2.

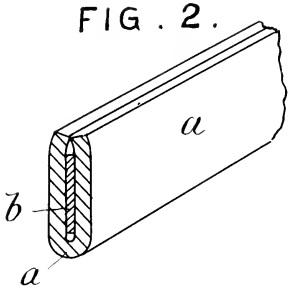


FIG. 3.

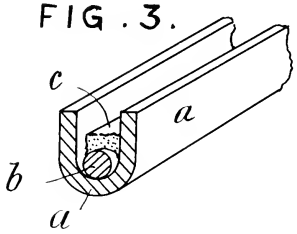


FIG. 4.

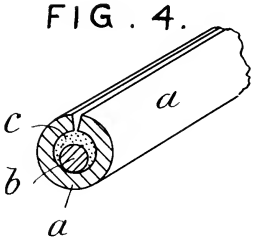
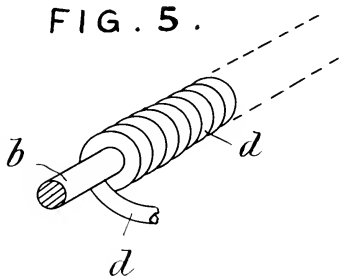


FIG. 5.



INVENTOR:
Ernest Henry Jones
By Wm Wallace White

UNITED STATES PATENT OFFICE.

ERNEST HENRY JONES, OF CANONBURY, LONDON, ENGLAND.

WELDING AND BRAZING.

1387,157. Specification of Letters Patent. Patented Aug. 9, 19:

Application filed September 18, 1918. Serial No. 254,568.

all whom it may concern:

Be it known that I, ERNEST HENRY JONES, subject of the King of Great Britain, iding at 4 Grange road, Canonbury, Lon-n, England, have invented new and useful provements in Welding and Brazing, of ich the following is a specification.

This invention relates to welding and zing rods which are used with an oxy-ylene or other blow pipe and has for its ject improvements whereby the weld or nt may be effected with greater celerity l efficiency than heretofore.

According to this invention, the welding is constructed or composed of all the terials necessary to produce under the t of the blow pipe the requisite metal or by for the purpose intended.

With this object a metal base, such as d steel or cast iron, or brass or gunmetal the form of a rod, tube, or channel, is troplated with and has secured therein ther metal or a combination of other als or alloys so that the welding rod der the influence of the heat of the blow e deposits the required metal or alloy suit the weld or joint. In the case of l or iron the surface of the rod or tube may be casehardened to provide an itional amount of carbon.

For example, a mild steel rod which has n electroplated with nickel when used as elding rod produces a metal weld or t of a greater tensile strength than if a kel steel welding rod had been employed, has the further advantage that the ten metal flows more freely and settles n greater density than does nickel steel er similar conditions.

gain: all the materials necessary for the positing of what is known as "high speed el" may be combined in a welding rod; example, a channel section mild steel ding rod with a carbon of cast iron con-, and a suitable proportion of vanadium, alt, tungsten, molybdenum, chromium, aluminium, or the like may be employ for depositing metal on the cutting parts tools, dies and the like.

The accompanying drawings illustr various examples of construction where one or more metals or alloys may be secu in the base in accordance with this inv tion.

Figures 1 and 2 illustrate a channel s tion base *a* containing a strip *b* of a me or alloy, Fig. 2 representing the rod af it has been subjected to pressure in order secure the strip in position.

Figs. 3 and 4 illustrate a channel secti base *a* containing a wire *b* of a metal alloy and a filling *c* of more or less ra metals in powder or paste form, Fig. 4 re resenting the rod after it has been su jected to pressure to secure the contents.

Fig. 5 illustrates a wire or ribbon base wound (in close or open spirals) upon a wi *b* of a metal or alloy.

It is advantageous to inclose the metal alloy within the base, as illustrated by w of example in the accompanying drawing as by so doing the metal or alloy is pr tected and does not burn away uselessl These remarks, however, do not apply electro-plated rods which I find quite sati factory.

I claim:—

1. In combination, a hollow memb formed of a basic metal, an alloy and welding mixture secured within said men ber.

2. A solder formed of an alloy, a weldin mixture, and a member formed of a bas metal bent to inclose and secure the allo and welding mixture within the member.

3. A solder formed of an alloy, and basic metal member wound around said allo in the form of a coil.

In testimony whereof I have signed m name to this specification.

ERNEST HENRY JONES.

1,650,905

Nov. 29, 1927.

O. L. MILLS

WELDING ROD

Filed Dec. 21, 1925

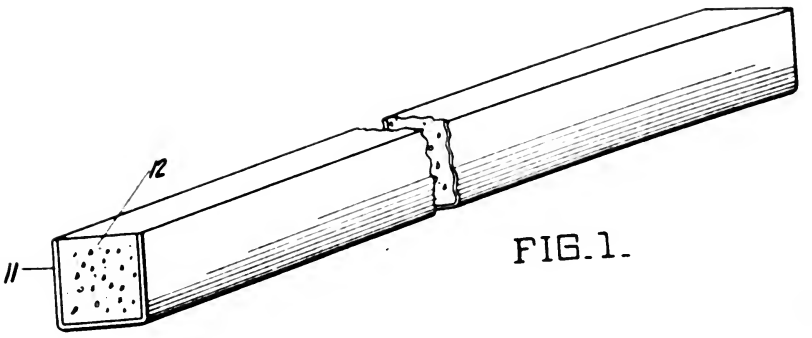


FIG. 1.

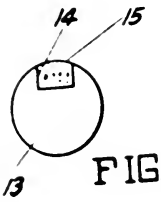


FIG. 2.

FIG. 3.

FIG. 4.

INVEN

Oscar L. Mil

BY A D F V

UNITED STATES PATENT OFFICE.

OSCAR L. MILLS, OF LOS ANGELES, CALIFORNIA.

WELDING ROD.

Application filed December 21, 1925. Serial No. 76,836.

This invention relates to the art of welding, and more particularly to welding rods. Such rods are used for example in electrical welding, as one of the electrodes for the arc by the aid of which such rods are fused, and welding thus accomplished; or in fact, the rods can be used in oxy-acetylene welding. Such rods are melted by the heat from whatever source derived, the material from which they are made is caused to adhere closely to the work. For example, welding rods are in common use to build up worn parts, such as bits used in well drilling equipment; or to repair broken parts by furnishing a molten material fusing the parts together upon solidification; or to repair other defects, such as sometimes occur in castings of iron or steel.

It is one of the objects of my invention to make it possible to supply rods of this character that fulfill their function in a highly satisfactory manner, and that can be constructed inexpensively.

It is another object of my invention to provide in general an improved welding rod.

Although in its broader aspects, my invention is applicable to all types of rods, it is more particularly concerned with the welding of cast iron. It has been proposed in the past to utilize rods of ordinary cast iron as an electrode for welding or for building up defective or worn castings; but such rods are not universally applicable, because it is difficult to secure a good molecular union; and especially since a fluxing element must be used to ensure proper fusing of the metal. It is accordingly another object of my invention to provide a composite rod capable of being used for repairing or building up cast iron in a more convenient and efficient manner.

It is still another object of my invention to provide a novel composition that is capable of being used in a welding rod. In this connection, I have developed a novel and useful process of manufacturing such welding rods, particularly rods used in connection with cast iron by which process it is possible to utilize

cal and chemical characteristics of soft an fine-grained cast iron, and to vary this con position to secure any grade of "cast iro desired.

My invention possesses many other adva tages, and has other objects which may l made more easily apparent from a consider tion of several embodiments of my inventio For this purpose I have shown a few forn in the drawings accompanying and formir part of the present specification. I sha now proceed to describe these forms in d tail, which illustrate the general principl of my invention; but it is to be understoc that this detailed description is not to l taken in a limiting sense, since the sco of my invention is best defined by the a pended claims.

Referring to the drawings:

Figure 1 is a perspective view of one for of rod constructed in accordance with n invention; and

Figs. 2, 3, and 4 are end views of oth forms of rods that embody my invention.

It is one of the features of my inventic that by its aid, it is practicable to supply tl material to be fused with the work in a ver convenient manner. For this purpose, composition is first made up, comprising tl materials found to be advantageous fc forming the welding rod; and since suc composition is preferably in the form of mixture including divided metallic or alloy ing particles. I provide a receptacle for tl composition, such as shown at 11, Fig. This receptacle in this instance is in the for of a rectangular trough of just sufficier thickness to impart rigidity to the bar, an so that its volume does not materially alt the composition of the complete bar. She metal of about 30 mils thickness can be us for this receptacle, and it may be copper brass, or iron. The container 11 can also l formed by stamping, rolling, forging drawing. The composition 12 can be plac in the receptacle 11 while the composition in a plastic state. This composition can l such as to provide a wearing layer of hig

on of ordinary cast iron, for repairing or uilding up iron castings. In that case the ontainer 11 should of course be made of ron or steel.

The important feature of the rod as thus ar described is that a metallic shell or ehicle is used for holding a welding comosition, whereby such a welding composiion can be conveniently applied. The bar r rod can be fused either by the aid of an lectric current, forming an arc between it nd the work, or by other means, such as an xyacetylene flame. Of course my invenion is not limited to the precise form of ontainer for the composition; in fact, in ome instances the container itself enters naterially into the ultimate composition of he matter welded. Such a bar is shown in nd elevation in Fig. 2, wherein the container ar 13 may be of low grade carbon steel, and nay have a groove or recess 14 formed in it y rolling, drawing or milling, in which groove the composition 15 can be accommoated. The composition can be such as to lloy with the bar 13 when welded, to form a igh grade steel alloy, such as tungsten steel, ickel chromium steel, or vanadium steel.

Still other forms of convenient containers an be used. In Fig. 3 a hollow tube 16 is shown, utilized for this purpose; and in Fig. 4, a triangular trough 17.

One of the most important features of my nvention resides in the application of such forms as shown to the provision of rods for welding cast iron, and especially the provision of such composition rods that contain he necessary flux for welding. The manner for manufacturing such a rod will now be described in detail.

In order to maintain the material for the ods at minimum expense, I make use of cast ron borings or chips, which are cut from astings in the process of machining them. Such material can be obtained for little, for nachine shops are usually hampered with heir disposal. But no matter from what ource obtained, I first of all grind the cast ron to small particles, to pass through a 20 nesh screen or finer, depending upon the ultimate size of the rods to be constructed. I then mix this granular material with a mall proportion of other materials in accordance with the desired composition of the ron desired to be deposited. For example, f silicon, manganese, phosphorus, sulphur r vanadium are to be added, this can conveniently be accomplished by the addition f fine particles (60 mesh or finer) of ferrosilicon, ferromanganese, ferrophosphorus, r ferrovanadium. Carbon can also be added in any desired form; such as graphite, oke dust, bone black or lamp black. A mall proportion of slag forming elements, uch as aluminum and magnesium, are [illegible] to added, as well as [illegible] oil of all of the [illegible]

To this mixture of granular particles there is added a binder, preferably carbonaceous, for holding the material together. Example of such binders are linseed oil, fish oil, soda silicate, [illegible] Enough of the binder should be used to make a thick paste after thorough mixing of all of the materials. It is of course permissible to use other kinds of binders, such as sodium silicate, although a carbonaceous binder is preferred.

Due to the addition of such materials as ferrosilicon and ferrophosphorus in the composition, the weld takes place without material danger of any substantial chemical union between the carbon and the iron to form a hard compound. The carbon is added to compensate for the carbon that is lost during the weld. The carbonaceous binder also assists in this function, and at the same time keeps the rod free from harmful ingredients that are present in other forms of binders.

In order to provide a flux for the materials, a small percentage of any appropriate material in a finely divided state can be incorporated in the mixture. Examples are fluor spar, carbonate of soda, or bicarbonate of soda. The proportions in the mixture are from about one to four per cent.

After this paste is thoroughly mixed, it can be put into the container 11, 16, or 17 such as shown in the drawings, and then finally baked for a sufficient time to stiffen and harden the composition. The rod is then ready for use in the well known manner, without the aid of additional fluxes or the like.

I claim:

1. A welding rod comprising a metallic container, and a homogeneous welding composition in the container, said composition containing substantially all of the material to be deposited by the weld.

2. A welding rod for depositing an alloy having the composition of cast iron, comprising a thin metallic container having a longitudinal groove or trough therein, and a homogeneous composition of flux and of the alloy constituents in said recess.

3. A composition for use in welding and for depositing by welding, an alloy having the composition of cast iron, comprising a homogeneous mixture of cast iron particles, a binder, and a flux.

4. A welding composition, comprising cast iron particles, finely divided alloying materials of such proportions as required in the final product produced by welding, a binder, and a small percentage of fluxing material.

5. A welding composition, comprising cast

through a screen no coarser than 20 mesh, finely divided alloying materials capable of passing through a screen no coarser than 60 mesh, and of an amount sufficient to produce the desired ultimate alloy, a binder sufficient to make a thick paste of the cast iron and alloying materials, and a finely divided flux of between one and four percent of the entire composition.

6. The process of manufacturing a welding composition, which comprises disintegrating cast iron borings to granular fineness, mixing with these particles, finely divided alloying material and a fluxing material, making a thick paste of the above by the aid of a binder, and baking until stiffness and hardness is secured.

7. A welding composition, compris homogeneous mixture of a metal, all materials entering into the weld, and bonaceous binder.

8. A welding composition, compris homogeneous mixture of cast iron cles, ferrophosphorous, and a carbona binder.

9. A welding rod for depositing an having the composition of cast iron, prising a thin metallic container, and a ing composition therein including cast particles, and a carbonaceous binder.

In testimony whereof I have hereun my hand.

OSCAR L. MIL

(No Model.)

J. W. WYCKOFF & J. M. WETTON.

METAL FOR BLADES, PIPES, &c.

No. 529,990. Patented Nov. 27, 1894.

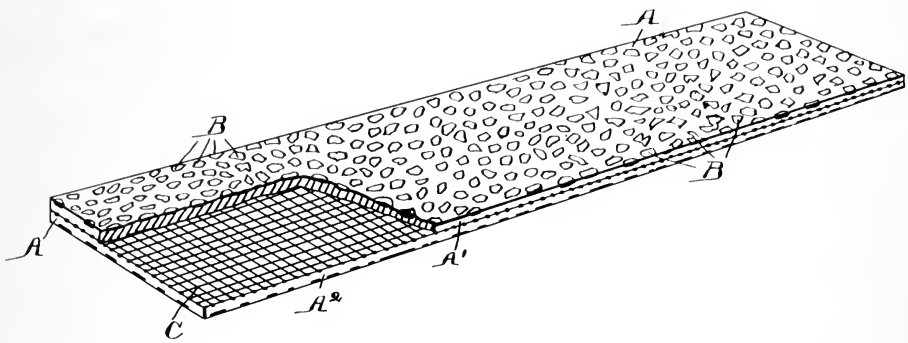


Fig. 1.

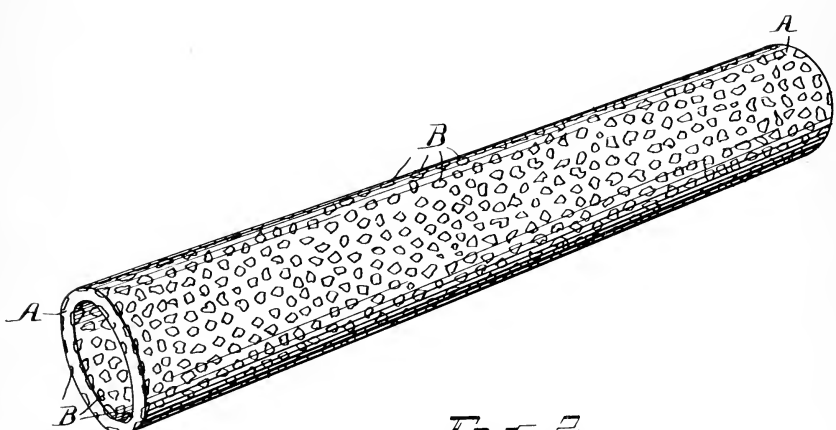


Fig. 2.

Witnesses
O. B. Barringer
John F. Miller

Inventors
James W. Wyckoff
John M. Wetton
By their Attorney
Newell & Wright.

UNITED STATES PATENT OFFICE

JAMES W. WYCKOFF AND JOHN M. WETTON, OF JACOBSVILLE, MICH

METAL FOR BLADES, PIPES, &c.

SPECIFICATION forming part of Letters Patent No. 529,990, dated November 27, 18

Application filed July 14, 1893. Serial No. 480,484. (No model.)

To all whom it may concern:

Be it known that we, JAMES W. WYCKOFF and JOHN M. WETTON, citizens of the United States, residing at Jacobsville, county of Houghton, State of Michigan, have invented a certain new and useful Improvement in Metal for Blades, Pipes, &c.; and we declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, which form a part of this specification.

Our invention relates to certain new and useful improvements in the construction of metal for various uses, and it consists of the matter hereinafter described and claimed and illustrated in the accompanying drawings, in which—

Figure 1 is a view in perspective of a piece of metal embodying our invention, showing a portion broken away. Fig. 2 is a view in perspective showing a piece of metal pipe embodying our invention.

Our invention is intended to provide a metal for cutting purposes having hard cutting particles integrally united therewith. We will describe our invention as adapted and applied for the construction of blades and pipes used for sawing, drilling or cutting stone, as an example of the uses to which the invention may be put.

It is well understood that at present, stone sawing is done by gangs of soft iron blades with sand or crushed steel washed into the cut or kerf to assist in the work. In core drilling or prospecting also it is well understood that common pipe is used for the cutting bit, and the operation of the same, with crushed steel put into the hole occasionally, does the cutting.

The object of our present invention is to provide a metal for this and analogous purposes wherein crushed steel particles of any desired size, or other forms of steel, as of wire, or other particles or metal fragments are tionary teeth or projecting cutting edg the work formerly done by the loose s crushed steel employed in connection w soft metal blade or pipe.

Blades or pipes constructed in acco with our invention will evidently fa and expedite the work to be done, en the work to be done not only faster, b superior manner also and at less expe

In the drawings A represents the soft or body of the blade or the pipe. B sents steel particles rolled thereinto.

We prefer to construct the metal, of the blades or pipes are constructed parts, the crushed steel being pref rolled into each of said parts. Betwe parts we prefer to locate, for same pu steel wire, said parts with the wire th tween being welded together and st tempered. This construction serves a most satisfactory cutting edge on the

A′ and A² represent the two parts metal. In making or rolling the met blades or pipes, the two pieces of soft i A² of requisite thickness, are heate proper degree of heat and between t placed the steel wire C, if employed, th wire preferably extending cross-wise parts A′, A² or cross-wise of the cuttin of the plate or blade. The wire may be form of wire netting, the wires lying wise being of steel and those runni other way or longitudinally of the bl soft iron, the soft iron when only bein to hold the steel wires in place and at distances apart. The crushed steel pa may be fed into the heated metal thr hopper or otherwise, as the metal through the rolls, and the whole is thus effectually together. When tempered usual manner, the steel is hardened, l the iron soft.

While we have described our invent applied to saws and pipes for stone c we do not limit ourselves solely ther our invention contemplates its use for

g both into the plate, as may be de-
It will be seen that the metal so made
d cutting particles integrally united
e soft metal may have a cutting face
or both sides thereof as well as a cut-
ge.

t we claim as our invention is—

metal blade constructed in two soft
parts, hardened wire located between
irts embedded therein, said soft metal
ith the intervening wire formed into a
integral piece, substantially as de-
.

metal blade formed of two soft metal parts having hardened fragments or particles embedded therein, and a wire netting embedded therebetween, one series of wires in said netting being hardened and running transversely across the metal plate, substantially as described.

In testimony whereof we sign this specification in the presence of two witnesses.

JAMES W. WYCKOFF.
JOHN M. WETTON.

Witnesses:
A. H. ANDRUS,
GEORGE PFEIFER.

During the proceedings had before the Court on the Order to Show Cause why a preliminary injunction should not issue in the above entitled cause, there were introduced in evidence by plaintiff the following physical exhibits, to wit: Two rods and two welds referred to in the affidavits of Winston F. Stoody and Walter Schumert, which were marked as follows:

The Hastellite rod with the red tip of the defendant; was marked EXHIBIT A, and its weld EXHIBIT B.

The tube Borium rod of the plaintiff was marked EXHIBIT C and its weld EXHIBIT D.

The plaintiff also introduced in evidence a verified complaint together with attached exhibits and the patent No. 1,803,875 in suit, a copy of which patent is here inserted.

[Printer's Note]: Patent No. 1,803,875 is not here set forth, as same already appears as a part of the Complaint (Tr. pp. 5-20). [110]

CERTIFICATE OF JUDGE.

The foregoing Condensed Statement of Evidence, together with the Exhibits referred to and incorporated and set forth therein, is hereby allowed and approved, and the same is ordered filed as the Condensed Statement of Evidence to be included in the Record on Appeal in the above entitled cause, as provided for in Equity Rule 75.

Dated this 16 day of January, 1936.

WM. P. JAMES
United States District Judge.

[Endorsed]: Lodged Jan. 6, 1936.

[Endorsed]: Filed Jan. 16, 1936. [111]

[Title of Court and Cause.]

PROPOSED ADDITION TO CONDENSED STATEMENT OF EVIDENCE.

Plaintiff proposes the following addition to the Condensed Statement of Evidence under equity rule 75 to be added as page 23a:

In the event that defendant intends to rely upon the alleged defense of laches or estoppel by reason of certain correspondence passing between the defendant and plaintiff, or plaintiff's attorney, there should be included as a part of the statement of evidence following page 23a, the affidavit of Charles C. Sheffler in which he sets out copies of five letters passing between plaintiff and defendant.

FRED H. MILLER
CHARLES C. MONTGOMERY
Attorneys for Plaintiff. [112]

Received copy of the within proposed addition etc., this 15th day of January, 1936.

LYON & LYON,
By R. E. CAUGHEY,
Attorneys for Defendant. [113]

[Endorsed]: Filed Jan. 16, 1936.

At a stated term, to-wit: The September Term, A. D. 1935, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, California, on Wednesday, the 27th day of November, in the year of our Lord one thousand nine hundred and thirty-five.

Present: The Honorable WM. P. JAMES, District Judge.

[Title of Cause.]

This cause having been heard before the Court on application of the plaintiff for a temporary injunction, on the record and affidavits offered on behalf of respective parties, together with argument of counsel the Court now determines that plaintiff is entitled to the temporary injunction, and such injunction is ordered to be issued; provided, however, that if the defendant shall furnish bond in the sum of $10,000.00, conditioned to answer to all costs and damages that may be suffered by the plaintiff in the event the issues are determined in favor of the plaintiff, an injunction shall not issue. The amount of the bond as fixed may be increased or decreased upon application of either party. An exception is noted in favor of the defendant. [114]

In the United States District Court, Southern District of California, Central Division.

In Equity No. 690-J.

STOODY COMPANY, a corporation,

Plaintiff,

vs.

HAYNES STELLITE COMPANY, a corporation,

Defendant.

ORDER FOR PRELIMINARY INJUNCTION.

THIS CAUSE having come on to be heard upon order to show cause why a preliminary injunction should not issue upon the affidavits and exhibits filed in consideration thereof and said matter having been argued in open court and due consideration thereof having been given and due cause thereonto appearing, IT IS HEREBY ORDERED:

That a preliminary injunction issue enjoining and restraining the defendant, its directors, officers, associates, clerks, servants, workmen, employees, and confederates, and each of them, from directly or indirectly manufacturing, using and/or selling, and/or causing to be manufactured, used and/or sold, and/or threatening to manufacture, use, and/or sell Haystellite composite rod and tube Haystellite with the intention that said welding rods be used in the practice within the United States of America or its territorial possessions in the practice of the process described and claimed in Letters Patent No. 1,803,875, dated May 5, 1931, and/or from supplying to the trade ingredients or

supplies with the knowledge and intention that they be used in practicing said process, and/or from in any wise infringing upon said Letters Patent and/or contributing to the infringement of said Letters Patent by others and/or conspiring with others [115] to so infringe said Letters Patent in any way whatsoever, and

IT IS FURTHER ORDERED:

That plaintiff above named shall file or cause to be filed herein a suitable bond or undertaking, upon the filing of which the taking effect of this injunction shall be conditioned, in the sum of $10,000.00, that plaintiff will well and truly pay to the defendant such damages not exceeding said sum as the defendant may sustain by reason of said preliminary injunction if the United States District Court finally decides that the said plaintiff is not entitled thereto.

IT IS FURTHER ORDERED:

That if the defendant shall file or cause to be filed herein a suitable bond or undertaking prior to the 6th day of December, 1935, in the sum of $10,000.00 conditioned to answer all costs and damages that may be suffered by the plaintiff subsequent to November 27, 1935, in the event the issues are determined in favor of plaintiff, an injunction shall not issue.

IT IS FURTHER ORDERED:

That the amount of the bond furnished by either the plaintiff or the defendant may be increased upon the application made to the Court.

An exception is allowed and noted in favor of the defendant.

Dated this 6 day of December, 1935.

WM. P. JAMES,
U. S. District Judge.

Stay of injunctive order is granted for 10 days from this date.

WM. P. JAMES,
U. S. Dist. Judge.

Approved as to form as provided in Rule 44.

.....,
Attorney for Defendant.

FRED H. MILLER,
Attorney for Plaintiff.

[Endorsed]: Received copy of the within this 4th day of December, 1935. Leonard S. Lyon, Attorney for Defendant.

[Endorsed]: Filed Dec. 6, 1935. [116]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Judge of Said Court:

The above named defendant, HAYNES STELLITE COMPANY, a corporation, feeling aggrieved by the Order entered in the above entitled cause on the 6th day of December, 1935, DOES HEREBY APPEAL from said Order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignments of Error filed herewith, and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court in such case made and provided.

AND YOUR PETITIONER FURTHER PRAYS that the proper order relating to the required security to be required of it be made.

ALL OF WHICH is respectfully submitted.

HAYNES STELLITE COMPANY,
By HENRY S. RICHMOND,
Solicitor for said Defendant.

LEONARD S. LYON,
HENRY S. RICHMOND,
Solicitors and Of Counsel for Defendant. [117]

[Endorsed]: Filed Dec. 13, 1935. [118]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

NOW COMES the above named defendant, HAYNES STELLITE COMPANY, a corporation, and files the following assignments of error upon which it will rely upon the prosecution of appeal in the above entitled cause from the Order entered and recorded on the 6th day of December, 1935, by this Court granting plaintiff's application for a temporary injunction.

The United States District Court for the Central Division of the Southern District of California erred—

(1) In granting plaintiff's application for temporary injunction.

(2) In not denying plaintiff's application for temporary injunction.

(3) In not finding Stoody patent No. 1,803,875 in suit invalid. [119]

(4) In enjoining the manufacture of defendant's Haystellite Composite Rod and defendant's Tube Haystellite.

(5) In enjoining the sale of defendant's Haystellite Composite Rod and defendant's Tube Haystellite.

(6) In not ordering that plaintiff's Bill of Complaint be dismissed.

WHEREFORE, Appellant Prays that said Order be reversed and that said District Court of the Central Division for the Southern District of California, be ordered to enter an Order vacating its Order granting plaintiff's application for a temporary injunction, and that it enter an Order denying to plaintiff a temporary injunction in this cause.

HAYNES STELLITE COMPANY,
By HENRY S. RICHMOND,
Solicitor for Defendant.

LEONARD S. LYON,
HENRY S. RICHMOND,
Solicitors and Of Counsel for Defendants. [120]

[Endorsed]: Filed Dec. 13, 1935. [121]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL, WITH SUPERSEDEAS.

Considering the Petition for Appeal in the above-entitled cause this day presented, IT IS ORDERED that an appeal be allowed to Haynes Stellite Company, petitioner therein and defendant in this suit, from the order for preliminary injunction rendered against said defendant in the above-entitled and numbered cause, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the Ninth Circuit, and that upon the execution of a bond in the penalty of Twenty-five Thou-

sand Dollars ($25,000.00), said appeal shall operate as a supersedeas of said order and shall suspend until the final decree or appeal herein the effect of the injunction herein; and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to and filed in the United States Circuit Court of Appeals for the Ninth Circuit according to law as prayed for. This Court reserves the right to increase the Supersedeas Bond for sufficient cause shown.

Dated, Los Angeles, California, December 12, 1935.

WM. P. JAMES,
United States District Judge. [122]

[Endorsed]: Filed Dec. 13, 1935. [123]

[Title of Court and Cause.]

BOND ON APPEAL SUPERSEDING INJUNCTION.

Know All Men by These Presents:

That we, HAYNES STELLITE COMPANY, a corporation organized and existing under the laws of the State of Indiana and having its principal place of business at Kokomo, Indiana, as principal, and UNITED STATES GUARANTEE COMPANY, a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in the City of New York, State of New York, as surety, are held and firmly bound unto the above named STOODY COMPANY, in the sum of Twenty-five Thousand Dollars ($25,000.00) to be paid to the said Stoody Company, and for the payment of

which well and truly to be made, we bind ourselves, and each of us, and our and each of our successors in interest jointly and severally, firmly by these presents.

SEALED with our seals and dated the 13th day of December, 1935. [124]

WHEREAS, the above named HAYNES STELLITE COMPANY is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order for an injunction granted in the above-entitled suit in the District Court of the United States for the Southern District of California, In Equity, on the 6th day of December, 1935.

NOW, THEREFORE, the condition of this obligation is such that if the above named HAYNES STELLITE COMPANY shall prosecute its said appeal to effect, or if it fails to make good its appeal shall answer all costs adjudged against it by reason thereof and shall pay plaintiff all damages and profits which may result from its manufacture and sale of its welding rods, the manufacture and sale of which are by said injunction enjoined, from and after the date hereof until the final decision of said District Court thereon, this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

BUT IT IS UNDERSTOOD that this bond shall not be considered as securing the payment of any damages or profits whch may have resulted from the manufacture and sale of infringing welding rods prior to the date hereof.

HAYNES STELLITE COMPANY
By R. L. LERCH
Its Acting District Sales Manager
UNITED STATES GUARANTEE COMPANY
[Seal] By R. G. HILLMAN
Its Attorney-in-Fact
and M. S. BANKS
Its Attorney-in-Fact [125]

State of California,
County of Los Angeles.—ss.

On this 13th day of December, 1935, before me, Eugene N. Frankenberger, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared R. L. Lerch, known to me to be the acting District Sales Manager for the Haynes Stellite Company, the corporation which executed the within annexed instrument, and acknowledged to me that such corporation executed the same and that he had authority to execute the same for and on behalf of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal in said County the day and year first above written.

[Seal] EUGENE N. FRANKENBERGER
Notary Public in and for said State and County.

State of California,
County of Los Angeles.—ss.

On this 13th day of December, A. D. 1935, before me Chas. E. Brown, a Notary Public in and for the said County and State, personally appeared R. G. Hillman and M. S. Banks, known to me to be the persons whose names are subscribed to the within Instrument, as the Attorneys-in-Fact of United States Guarantee Co. and acknowledged to me that they and each of them subscribed the name of UNITED STATES GUARANTEE COMPANY thereto as principal and their own names as Attorneys-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

CHAS. E. BROWN
Notary Public in and for said County and State.

My Commission expires January 12, 1938.

Examined and recommended for approval as required in Rule 28.

HENRY S. RICHMOND
Attorney for Defendant.

The foregoing bond is hereby approved to operate as a supersedeas as to said order for injunction.

WM. P. JAMES
United States District Judge.

[Endorsed]: Filed Dec. 13, 1935.

[Title of Court and Cause.]

STIPULATION CONCERNING FORWARDING OF PHYSICAL EXHIBITS TO THE CIRCUIT COURT OF APPEALS.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, through their respective counsel, that the Hastellite Rod with the red tip of the defendant marked "Exhibit A" and its weld marked "Exhibit B", and the tube borium rod of the plaintiff marked "Exhibit C" and its weld marked "Exhibit D" be forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit by the Clerk of this Court, the same to be used by either or both parties in the argu-

ment before the Circuit Court of Appeals, the cost and expense of so forwarding the same to be borne by the defendant-appellant herein.

Dated this 23rd day of January, 1936.

FRED H. MILLER
CHARLES C. MONTGOMERY
Attorneys for Plaintiff.
LEONARD S. LYON
HENRY S. RICHMOND
Attorneys for Defendant.

The foregoing Stipulation IS APPROVED and IT IS SO ORDERED.

WM. P. JAMES
U. S. District Judge. [127]

[Endorsed]: Filed Jan. 24, 1936. [128]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of said Court:

Sir: Please prepare and certify to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies of the following, the same to constitute the Transcript of Record on Appeal to said United States Circuit Court of Appeals for the Ninth Circuit on Haynes Stellite Company's appeal from the Order for Preliminary Injunction dated the 6th day of December, 1935:

1. Bill of Complaint, filed June 18, 1935;
2. Patent in suit No. 1,803,875;

3. Order to Show Cause, issued June 19, 1935;

4. Order of Court filed June 26, 1935;

5. Affidavit, and copies of letters attached thereto, of Charles C. Scheffler, filed July 1, 1935;

6. Minute Order of Court, of July 1, 1935;

7. Answer of Defendant, filed July 26, 1935;

8. Minute Order of Court, entered November 27, 1935;

9. Order for Temporary Injunction, dated December 6, 1935;

10. Assignments of Error, filed December 13, 1935;

11. Petition for Appeal, filed December 13, 1935; [129]

12. Bond on Appeal Superseding Injunction, filed Dec. 13, 1935;

13. Order Allowing Appeal, with Supersedeas, filed Dec. 13, 1935;

14. Citation, issued December 13, 1935;

15. Condensed Statement of Evidence, lodged January 6, 1936;

16. Notice of Lodgment of Narrative Statement of Evidence;

17. This praecipe.

18. Page 1 of Plaintiff's Proposed Addition to Condensed Statement of Evidence.

Dated this 21st day of January, 1936.

LEONARD S. LYON,
HENRY S. RICHMOND,
Attorneys for Defendant-Appellant.

Plaintiff waives filing of praecipe for any additional record.

CHARLES C. MONTGOMERY,
FRED MILLER,
Attys. for Plaintiff.

Jan. 21, 1936.

Due Service and receipt of a Copy of the within Praecipe for Transcript of Record is hereby admitted this 21st day of January, 1936.

CHARLES C. MONTGOMERY,
FRED H. MILLER,
Attys. for Plaintiff.

[Endorsed]: Filed Jan. 21, 1936. [130]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD

I, R. S. ZIMMERMAN, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing typewritten transcript comprised of one volume, and numbered from 1 to 129 inclusive, to contain the original Citation, and a full, true and correct typewritten copy of the original Bill of Complaint, Order to Show Cause, Order of June 26, 1935, Affidavit of Charles C. Scheffler, Answer, Notice of Lodgment of Condensed Statement of Evidence under Equity Rule 75, Proposed Addition to Condensed Statement of Evidence, Order of November 27, 1935, Order for Preliminary Injunction, Petition for Appeal, Assignments of Error, Order Allowing Appeal with Supersedeas, Bond on Appeal superseding Injunction, Stipulation concerning forewarding of physical exhibits to the U. S. Circuit Court of Appeals, and Praecipe for Transcript of Record on Appeal, together comprise the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit;

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing typewritten

record amount to $22.05, and that said amount has been paid me by the Appellant herein;

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States for the Southern District of California, this 4th day of February, in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States of America, the one hundred sixtieth.

[Seal] R. S. ZIMMERMAN,
Clerk of the United States District Court for the Southern District of California.

By EDMUND L. SMITH,
Deputy Clerk.

[Endorsed]: No. 8119. United States Circuit Court of Appeals for the Ninth Circuit. Haynes Stellite Company, a Corporation, Appellant, vs. Stoody Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 5, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8119

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Haynes Stellite Company, a corporation,
Appellant.

vs.

Stoody Company, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

FREDERICK S. LYON,
LEONARD S. LYON,
811 W. Seventh St., Los Angeles, California,
Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

No. 8119

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Haynes Stellite Company, a corporation,
Appellant.

vs.

Stoody Company, a corporation,
Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal from an order [R. 128] of the District Court of the United States for the Southern District of California granting an injunction *pendente lite* in a suit for alleged infringement of patent 1,803,875, granted May 5, 1931, for an alleged novel "Method of Facing Tools." (R. 16-20.]

The motion was heard and determined upon the bill of complaint, answer, an affidavit on behalf of plaintiff setting forth the acts of alleged infringement, certain documentary proofs, and affidavits on behalf of defendant, the facts contained therein being uncontroverted and neither

impeached nor explained by any evidence or proofs submitted on behalf of plaintiff-appellee.

Defendant-appellant submits that it was an abuse of sound, legal discretion to grant said injunction; that the District Court should have denied said injunction, held said patent invalid and dismissed plaintiff-appellee's complaint.

It is well settled that a misapplication of the law to conceded facts is an abuse of discretion and will be reviewed. (*Winchester Repeating Arms Co. v. Olmsted,* 203 F. 493; *Hanover Star Milling Co. v. Allen & Wheeler Co.,* 208 F. 513, 523; *Union Tool Co. v. Wilson,* 259 U. S. 107, 112, 66 L. ed. 848, 852.) It is further well settled that where it appears upon a motion for temporary injunction that there is no controverted issue of fact to be determined, and the issues of validity and infringement are questions of law to be determined on the undisputed facts, and invalidity of the patent or non-infringement is clear, the Court should hold the patent invalid and dismiss the suit. (*Mast, Foos & Co. v. Stover Mfg. Co.,* 177 U. S. 485, 44 L. ed. 856; *Co-operating Merchants Co. v. Hallock, et al.,* 128 F. 596; *National Picture Theatres v. Foundation Film Corp.,* 266 F. 208; *Sommer v. Rotary Lift Co.,* 66 F. (2d) 809 (C. C. A. 9).)

ASSIGNMENTS OF ERROR.

Upon this appeal appellant assigns as error the order [R. 128-9] that preliminary injunction issue against defendant as in said order set forth, and in so doing the District Court erred—

(1) In granting plaintiff's application for temporary injunction;

(2) In not denying plaintiff's application for temporary injunction;

(3) In not finding Stoody patent No. 1,803,875 in suit invalid;

(4) In enjoining the manufacture of defendant's Haystellite Composite Rod and defendant's Tube Haystellite;

(5) In enjoining the sale of defendant's Haystellite Composite Rod and defendant's Tube Haystellite;

(6) In not ordering that plaintiff's Bill of Complaint be dismissed. [Assignments of Error—R. 131-2.]

STATEMENT OF THE CASE.

The patent in suit purports to cover an alleged new method of facing tools. The only method described is to deposit a layer of material on the tool to be faced by melting thereon the end of the welding rod described in patent 1,757,601 granted to the same inventors. The only description of how to do this is contained in the sentence concluding, "by any suitable means such as an acetylene torch indicated at 6" [p. 1, lines 58-60—R. 17]. The application for the patent in suit was co-pending with the application upon which patent 1,757,601 was granted. Both applications described the same thing. The patent in suit purports to cover nothing more than using the rod of patent 1,757,601 for the only purpose and in the only way in which that rod could be used. In *Stoody Co. v. Mills Alloys, Inc.*, 67 Fed. (2d) 807, this Court held that there was no invention in the manufacture or use of that rod. Manifestly, the patent in suit cannot be sustained without doing violence to that decision in the absence of any disclosure of some new or patentable way of using the rod which this Court in its previous decision has said anyone has the right to make and use. As a matter of fact, there is no claim that the patent in suit describes anything new or unique about how to use a welding rod. The order appealed from in this case is directly opposed to the decision of this Court on patent 1,757,601. This Court has already found that there was no invention in the welding rod described in patent 1,757,601. If there had been anything new in the manufacture or use of such a rod, the earlier patent would have been upheld. To now allow the plaintiff to sustain the subsequent patent is to permit the plaintiff to circumvent the former decision of this Court. The use of the welding rod described in the patent in suit

is identically the use of the welding rod of the earlier patent. This welding rod is used no differently from any other welding rod. In substance, then, plaintiff is attempting by the order below to secure the identical monopoly which was denied to the plaintiff by this Court in its decision on patent 1,757,601.

In the patent in suit the alleged inventors recognize that the use of an acetylene torch to perform the welding was common and well known. The patent does not describe such method and refers only to the common practice and established common knowledge of the use of an acetylene torch in welding. The patent demonstrates that the inventors recognized the fact that nothing was required except to direct one to use the unpatented welding rod with an acetylene torch as commonly used in welding. These inventors do not assert, and they could not maintain, that they were the discoverers of acetylene welding. All that they said in the patent in suit is that the particular welding rod which they describe may be deposited on the tool by any suitable means, such as an acetylene torch. If there had been anything novel in the method, the patent does not disclose it and it does not comply with the requirements of R. S. Sec. 4888 (35 USCA, Sec. 33). (*)

The patent clearly admits that the application or use of this particular welding rod requires no modification whatsoever of the ordinary well-known method of use or application. If there be any difference between the resultant

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*"Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application * * * and shall file * * * a written description * * * of the manner and process of * * * using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art * * * to * * * use the same, * * *."

deposit of weld and other deposits of welds by acetylene welding, it must be found in the choice of the materials used and not in the method. It is not even claimed by plaintiff-appellee that the manner of use of the welding rod is material to the result sought. The patentees chose particles of tungsten carbide because of its known excessive hardness and because it was known that it had a very high melting point, much higher than that of ordinary steel; because of the knowledge that if such tungsten carbide products were intermingled with steel of a lower melting point, the steel would be melted and fused onto the tool while the tungsten carbide particles would be merely embedded in such fused steel. This required no change whatsoever in the method of application. The patentees believed that they were the discoverers of the fact that tungsten carbide was of excessive hardness; that it had a very high melting point, and that if intermingled with steel of lower melting point, melting and fusing the steel would simply embed the tungsten carbide particles. But in this they were fully mistaken. This Court so found in the previous case of *Stoody Co. v. Mills Alloys, Inc.,* 67 Fed. (2d) 815. While the patentees thought they were the discoverers of these inherent properties and characteristics, and based their claim of discovery thereon, this Court has repudiated that claim and held that such properties and characteristics were well known before Messrs. Stoody and Cole ever heard of tungsten carbide. In the opinion of this Court (67 Fed. (2d) 815), this Court says:

> "There is ample evidence in the record to support these findings."

The findings referred to are those of the special master, approved by this Court, that—

"Summing up the prior art it is found that at the time of the appearance of the welding rod of the patent * * *

"(1) It was common practice to combine in rod form various steel substances intended for deposit in a weld and to use a steel tube filled with alloying substances for the purpose.

"(2) It was known that tungsten carbide could be used advantageously in hard surfacing cutting tools.

"(3) It was known that tungsten carbide was not materially affected by a temperature of the degree of the acetylene torch and that it formed a bond with mild steel or other matrix metals. * * *

"It is true that the use of the tube of the patent results in a more facile and economical application of the material in a weld. However, in view of the state of the art the step taken did not involve the necessary element of inventive thought, but was an improvement logically coming from workers in the art, who applied their skill and knowledge to a given problem."

This Court correctly held that the patentees merely availed themselves of the common knowledge and used only the well known acetylene torch to melt the lower melting point metal, leaving the higher melting point tungsten carbide particles unaffected and merely embedded in the lower melting point metal; that this was an application of nothing but the common knowledge in the art of the inherent properties of the materials used. In fact, it was a result that was inevitable unless temperatures high enough to melt the highest melting point ingredient were employed. That tungsten carbide is of higher melting point

than ordinary steel is a well known scientific fact. It is disclosed in many technical works. It was amply proven in the record before this Court in 67 Fed. (2d) 807, and in the suit upon this alleged method patent against Mills Alloys, Inc. It is a fact of which the Court will take judicial notice.

One example that it was common knowledge that tungsten carbide particles would be merely so embedded in steel is the disclosure in the German patent to Siemens & Halske, No. 427,074 of March 25, 1922 [R. 101-105], in which it is stated:

> "It appears that the tungsten carbide completely dissolves in the cobalt-chromium alloy and a perfectly homogeneous mass is obtained. With many other metals, the carbide is merely embedded. The advantages and disadvantages are governed in each case by the particular use of the substance.
>
> "The form in which the tungsten carbide is contained in the finished substance naturally depends upon the metals used, it also depends upon the quantity of carbide used and upon various other circumstances." [R. 104.]

Professor Francis W. Maxstadt, in his affidavit on behalf of appellant, after referring to the above quotation from said German patent, says:

> "This patent clearly shows that tungsten carbide may be embedded in molten steel without difficulty and that it can be substituted without difficulty or change in procedure for the carborundum or other abrasive materials mentioned in the Chamberlin and Ringstrom patents." [R. 89.]

As it was "common practice to combine in rod form various steel substances intended for deposit in a weld"

(Opinion of this Court, 67 Fed. (2d) 815), and "common knowledge that tungsten carbide would be merely embedded" (German patent, *supra*), it was not an inventive act to select as one component particles of tungsten carbide for its well known properties and to embed these tungsten carbide particles in the resultant weld by using the old well known acetylene welding method without change or effect and which use was necessarily to fuse the lower melting point steel without affecting the higher melting point tungsten carbide. Bearing in mind that we are dealing with the method and not with the product, and any difference in product was due solely to the difference in the selected ingredients and due only to the natural properties and characteristics of the selected ingredient, it is clear that there was nothing novel in a patent law sense in the product, and especially it is clear that the patent in suit teaches no new method of welding, but on the contrary merely suggests that any known method, such, for example, as the acetylene torch, may be used. In said original *Stoody Co. v. Mills Alloys, Inc.*, case upon said welding rod patent it was shown by the evidence, and the master so found, that the oxy-acetylene torch method was well known and in common use prior to the Stoody invention; [see Transcript of Record in said case, Vol. 2, p. 640, where the master states, "They were applied by the usual acetylene welding method"]; and that it was common practice to bind in rod form various steel substances intended for deposit in a weld, the use of a steel tube filled with alloying substances for the purpose, and to deposit or weld these on the tool by the oxy-acetylene method. Said German patent to Siemens & Halske, issued in 1926, made it public knowledge that tungsten carbide could be used in welding; that if such tungsten

carbide was mixed with many metals, the tungsten carbide was merely embedded in the mass so welded onto said body. This German patent completely refutes any contention that Messrs. Stoody and Cole or either of them were the inventors or discoverers of the fact that where tungsten carbide is intermingled with mild steel or other matrix metals, and welded to a tool, the tungsten carbide particles would be merely embedded in the mass of metal thus deposited on the surface of such tool.

It is clear that Messrs. Stoody and Cole were not the inventors or discoverers of—

(1) tungsten carbide or that tungsten carbide particles could be embedded in a molten metal or alloy;

(2) welding a harder metal on the face of a tool or bit;

(3) using an acetylene torch as the means for producing the heat necessary to fuse the face of the tool or bit and the harder metal to be fused thereon;

(4) the fact that if particles of tungsten carbide were intermingled with steel and the admixture subjected to sufficient heat to fuse or make molten the steel particles, the tungsten carbide particles would be unaffected and that, upon cooling, the tungsten carbide particles would simply be embedded in the steel.

Clearly, all these were public knowledge prior to 1927 when Messrs. Stoody and Cole assert to have made such discoveries. What new method then did they discover?

This Court has heretofore determined that it was not in the welding rod of the patent in suit (or of patent 1,757,601), and was not in causing the welding by the acetylene torch.

The patent to Chamberlin, No. 1,572,349 [R. 94-95], discloses:

(1) first associating together a metal of relatively low melting point and pieces of a hard substance of relatively high melting point,

and describes at lines 78-82:

> "To insure that the crystals will be at the cutting end of the bit, in another method of manufacture, the crystals are first packed into a capsule of readily fusible material, such as lead, zinc, etc."

Said Chamberlin patent further discloses:

(2) supplying heat to the associated mass to cause the metal of low melting point to melt and be deposited on the tool and carry with it the pieces of hard substance depositing them on the tool,

describing this at lines 83-88 in the following words:

> "* * * and in casting the bit in the mold, either by gravity or pressure, the heat of the cast metal will melt the capsule and the metal of the bit and capsule thereupon flows in around the crystals and binds them together in the end of the bit."

The specification of the Chamberlin patent discloses:

(3) without materially changing their identity.

It is thus seen that the Chamberlin patent discloses this welding without materially changing the identity of the pieces of hard substances and that these pieces are embedded in the weld.

It is well known that carborundum crystals will not melt even at temperatures very much higher than the melting point of the metals used to bind them in such a weld to the bit; it is also well known that in this molten metal these crystals will not change their identity. This was recognized by Chamberlin, for he says at lines 46-51 of his specification:

> "The rotary motion of the drill bit edge against a hard substance, such as rock formation, brings the cutting edges of the *carborundum crystals* into play against said substance and causes a cutting or boring of the said substance to take place."

Chamberlin says at lines 85-88:

> "* * * will melt the capsule and the metal of the bit and capsule thereupon flows in around *the crystals* and binds them together in the end of the bit."

This is clear recognition on the part of Chamberlin that the carborundum crystals remain intact and do not materially change their identity when subjected to this operation.

Chamberlin also discloses:

(4) causing a fusion to take place between the metal of low melting point and the metal of the tool,

See lines 83-88:

> "* * * and in casting the bit in the mold, either by gravity or pressure, the heat of the cast metal *will melt the capsule and the metal of the bit* and capsule thereupon flows in around the crystals and binds them together in the end of the bit."

While Chamberlin does not mention the tungsten carbide as the abrasive material to be used in his bit, nevertheless he states (specification, lines 15-18):

> "* * * an abrasive material, such as carborundum crystals, although other metals and cutting crystals may be used."

And at lines 34-37:

> "These crystals preferably are carborundum crystals of large size, although corundum, garnet, alunite, etc., may be utilized in place of the carborundum."

In his affidavit [R. 83-86], Professor Maxstadt applies the teaching of this Chamberlin patent in particular to claim 5 of the patent in suit and demonstrates the total lack of novelty. He points out in conclusion:

> "It required no invention to substitute tungsten carbide for carborundum, since the properties of both were well known and both had been used as abrasives prior to both Stoody and Chamberlin." [R. 86.]

Clearly this Chamberlin patent discloses embedding high melting point abrasive particles in lower melting point metals. It is obvious if the user desired to substitute for carborundum another well known abrasive, such as tungsten carbide, because of preferred qualities, such substitution and the embedding thereof in the welded metal did not constitute a new discovery, especially when it was public knowledge that such substituted abrasive had all the qualities desired by the substitution.

The Ringstrom patent, No. 604,569, granted May 24, 1898 [R. 98-100], discloses another example of a method of facing tools and contains a description of supplying heat to the associated mass of material which is to be heated to cause the metal of low melting point to melt and be deposited on the tool and carry with it the pieces of hard substances, depositing them on the tool. This patent says [R. p. 99, lines 37-42]:

> "In carrying out the invention I take fine particles of the abrading material—such as diamond-dust, corundum, carborundum, emery, &c.—and give to each particle or granule of such material a metallic coating. This coating may be applied in several ways."

And at lines 86-98:

> "The coated particles are now mixed with the molten metal or alloy, which is to embed them and bind them together. Such metal or alloy may consist of a suitable metal and sulfur, phosphorous, carbon, silicon, or other metalloid. As regards the form of the abrading tool or article, the composition may be cast into the form of disks of different sizes and shapes or be cast on the surfaces of wires or ropes, such as endless ropes for use in cutting stones, &c. It can also be cast on cloth and on the edges of thin metal plates to be used as saw-blades."

This clearly shows that Ringstrom described and made known to the public that the abrasive material, such as diamond-dust, corundum, carborundum, emery, etc., remains intact at the temperature necessary to bind it to

the tool, and that its identity was not materially changed. Ringstrom also discloses:

> causing a fusions to take place between the metal of low melting point and the metal of the tool,

describing this at lines 86-89, p. 1:

> "The coated particles are now mixed with the molten metal or alloy, which is to embed them and bind them together."

While Ringstrom does not specify tungsten carbide, he does not limit himself to the abrasive material mentioned in the patent. There would be no invention in substituting one known abrading element for another well known abrading element, and this is true although the substitution be made for the purpose of securing the known characteristics of such substituted element. This is clearly set forth in the affidavit of Professor Maxstadt [R. 86-89]. There is no contradiction or disputation of Professor Maxstadt's testimony. It stands unquestioned and unimpeached.

These patents and disclosures clearly justify the opinion of this Court in *Stoody Co. v. Mills Alloys, Inc.*, 67 Fed. (2d) 807, at 815, where this Court says:

> "There is ample evidence in the record to support these findings."

i. e., the findings of the special master that tungsten carbide was known and was known as not materially affected by the temperature of the degree of an acetylene torch; that it formed a bond with mild steel or other matrix materials, and would be embedded in the lower melting point metals when welded by an acetylene torch.

The Special Master in His Report in the Second Stoody v. Mills Alloys Case, Y-101-J, Misconstrues His Findings and the Decision of This Court in Stoody v. Mills Alloys, Inc., 67 Fed. (2d) 807, and

Said Special Master Erroneously Decides Said Case on an Issue of Priority of Assumed Invention of the So-Called "Hot Rod" Method, Which Issue Is Not Determinative of the Case and Immaterial to Appellant's Defense in This Case.

In the case of *Stoody Co. v. Mills Alloys, Inc.,* 67 Fed. (2d) 807, an issue raised by the appellant was whether the so-called or therein termed "Hot Rod" method was a part of the prior art or was a part of the invention of Messrs. Stoody and Cole not publicly known or used more than two years prior to the application for the welding rod patent, No. 1,757,601. Defendant, Mills Alloys, Inc., asserted this "hot rod" method as additional defensive matter. Although this Court in its said opinion sustained the findings of fact of the special master respecting such so-called "hot rod" method, this Court does not ground its decision solely upon such so-called "hot rod" method. On the contrary, this Court states (pp. 814, 815), "On the subject of the prior art and of the lack of invention, the master found as follows: * * * There is ample evidence in the record to support these findings." There was before the Court in that case, as there is here, ample uncontrovertible proof that welding by means of the acetylene torch was old and well known for many years prior to 1927, the date fixed by the master for Messrs. Stoody and Cole's alleged invention. Notwithstanding this fact, said special master in said second *Stoody Co. v. Mills Alloys, Inc.,* suit upon this method patent, and upon

different testimony, has reversed his finding of fact as to who first used said so-called "hot rod" method and who produced it, and that it was a part of the art prior to Messrs. Stoody and Cole's invention, and having so reversed this one finding of fact he has ignored the general finding of fact made by him in said first case, and approved by this Court, that the use of the acetylene torch in welding was well known. He has reversed his finding that it was known that tungsten carbide could be used advantageously in hard surfacing cutting tools. He has reversed his finding that it was known that tungsten carbide was not materially affected by a temperature of the degree of the acetylene torch and that it formed a bond with mild steel or other matrix metals, and has erroneously found:

> "* * * it was not known that tungsten carbide and mild steel could be combined together and simultaneously deposited in a weld by the heat of an acetylene torch to produce a weld in which the tungsten carbide particles would be held embedded in a matrix formed by the steel." [R. 35-36.]

And concluded that:

> "The inventors were at liberty to use their knowledge of the hot rod method in the further conception of the method of the patent. Once having that conception they were equally at liberty to draw upon the prior art for the means by which the materials to be welded could be associated together. That the physical structure of the tube used in carrying out their method was not an invention in itself does not detract from the merit of invention here claimed." [R. 36.]

The special master thus falls into the error of deciding the case upon the "hot rod" issue, completely ignoring the ample evidence in the case sustaining his original findings. Furthermore, he totally ignores the fact that the patent in suit does not describe any such "hot rod" method. No justification can exist for the special master's interpolating a "hot rod" method into the patent in suit.

We have already called to Your Honors' attention the fact that the only description contained in the patent of a method of use of the welding rod is the statement that

> "A layer of metal 5, in which the particles 2 are embedded, is deposited thereon *by melting the end of the welding rod by any suitable means such as an acetylene torch* indicated at 6." (p. 1, lines 56-60.)

We have heretofore called attention to the fact that unless this reference is to some well known method of welding, such, for example, as the acetylene torch method, the disclosure of the patent in suit does not comply with the requirements of R. S. U. S. Sec. 4888, 35 USCA, Sec. 33. Obviously if such method were then publicly well known, it was not a patentable invention but was in the public domain. There is no description in the patent in suit of said so-called "hot rod" method. If the invention asserted to be novel and asserted to be infringed is the "hot rod" method, it is clear that there is no patent thereon, if such method in fact and substance does differ from the mere use of an acetylene blow pipe or torch in welding. However, the most that can be said of said so-called "hot rod" method is that it differs from the ordinary acetylene torch method of welding only in details of technique and manipulation, which are not in any manner referred to, described, or set forth in the patent

in suit. It is clear, therefore, that the special master in this second *Stoody Co. v. Mills Alloys, Inc.*, case has erred and has attempted to disregard the adjudication of this Court and the uncontradicted and uncontrovertible record evidence disclosing that the method so far as described in the patent in suit is totally old. In 67 Fed. (2d) 807, at 808, the Court says:

> "In use, the steel of the tube is melted by the heat of an acetylene torch, and is fused to the steel of the bit."

This is the whole method and this is the method that the special master originally found was old and which this Court found was old. It is the only method described in the patent.

The Mills patent, No. 1,650,908 [R. 117-120] contains—

> "a written description * * * of the manner and process of * * * using it, in such full, clear, concise and exact terms as to enable any person skilled in the art * * * to * * * use"

the method as does the patent in suit. (R. S. U. S., Sec. 4888, 35 USCA, Sec. 33.)

> "Such rods are used for example in electrical welding, as one of the electrodes for the arc by the aid of which such rods are fused, and welding thus accomplished; or in fact, the rods can be used in oxy-acetylene welding. Such rods are melted by the heat from whatever source derived, the material from which they are made is caused to adhere closely to the work." (Mills patent, p. 1, lines 2-11.)

The English patent to Morrison, No. 27,954 of 1908 [R. 106-107] contains even a more detailed description of the use of the acetylene torch method, as follows:

> "My ordinary method of working is firstly to fix upright in a vice, the piece of ordinary mild steel, or wrought or cast iron, upon the upper end, edge, or portion, of which I wish to operate. Secondly, to take in my left hand a piece of high grade or tool steel (grasped if necessary within a pair of tongs) and hold it immediately over the other. Thirdly, to take in my right hand, an oxy-acetylene blowpipe, and to apply the hottest part, or the inner white cone apex of its flame simultaneously to the upper end of the mild steel or iron, and the lower end of the high grade steel, for a few seconds until both are in a state of semi-fusion. Then I momentarily direct the flame more particularly to the highly heated end of the high grade steel, until it is so completely fused or liquefied, that portions of it drop away on to the other, and form a complete weld." (Morrison patent, p. 1, line 34, to p. 2, line 2.)

If we substitute in the foregoing description, in "Secondly" for the words "a piece of high grade or tool steel" the words "the welding rod," we have a more complete description of the oxy-acetylene blow type method of welding than is contained in the patent in suit. We thus see that, as testified by Professor Maxstadt at R. 90:

> "The Morrison patent discloses completely what has been referred to in the Stoody-Mills litigation as the 'hot rod method'."

In fact, as pointed out by Professor Maxstadt [R. 91]:

> "Any skilled operator of the acetylene torch, applying the ordinary technique of autogenous welding to the welding rod covered in the Stoody patent 1,757,601, would inevitably carry out the method claimed in the patent in suit."

It is clear that substituting tungsten carbide particles for other high melting point particles without changing otherwise the operation, is not the production of a new method. As said by Judge Davis in *Rohm v. Martin Dennis Co.*, 263 Fed. 106, at 107:

> "A process is not a machine, a thing or result. It is the mode or method of operation or action employed in producing a thing or result."

In that case the patent was for a process of bating hides. Claim 1 read as follows:

> "The process for bating hides, which consists in treating the hides with an aqueous extract of the pancreas of animals substantially as described."

The method disclosed is that instead of using a bate of dog manure and water the patentee used an aqueous extract of the pancreas of animals, the only change in the old process of bating hides being the different bate from that previously used.

> "The question, therefore, is whether or not the use of Rohm's bate, instead of the old dog manure bate, but with the same method of operation, constitutes a new and patentable process. The bate is described in the specification of the patent:
>
> " 'The principal constituent of the said pancreatic extract is trypsin, the effect of which is materially assisted by the other enzyme of the pancreas, viz. steapsin, which has the property of splitting up fat and completing the saponification of the fat contained in the hides.
>
> " 'Aqueous pancreatic extracts alone have a very efficient bating action, but it is advantageous to add salts of ammonia or of alkalies or mixtures of such

salts. The favorable effect of these salts on hides become apparent chiefly by the fact that the hides shrink, become thinner, and are less liable to become rough, on being placed in pure water after the bating process, which defect is liable to occur when the hides have a strong alkaline reaction and the water contains a considerable quantity of calcium bicarbonate.

" 'The details of procedure will appear from the following example: A pancreas weighing about 250 grains is extracted with 1 liter of water, and 10 cubic centimeters of this extract are added to 990 cubic centimeters of 0.1 per cent. aqueous solution of ammonium chloride. The solution thus obtained is an excellent bate.

" 'When the hides, which have been limed and have an alkaline reaction, are introduced into the bating liquid, the hides are liable to become rough, through the precipitation of calcium carbonate, in case the water employed contains much calcium bicarbonate in solution. This defect may occur, whether the bating contains trypsin alone, or together with salts of ammonia or alkali, and it may be avoided by subjecting the water intended for the preparation of the bate to a preliminary treatment, which consists in precipitating the carbonic acid by means of a suitable quantity of lime water, or in adding to the bating liquid before the introduction of the hides starch paste or other organic or inorganic materials adapted to envelope the calcium carbonate.'

"This is simply a description of the bate, a product, and the method by which it is extracted or prepared. The patent, however, is not the bate, or preparation thereof, but for its use after being prepared. This is recognized by counsel for complainant who say in their brief (page 20):

" 'The patent in suit is for the process of using the bate, not of preparing it.'

"This being true, it follows that the patent is invalid, for it discloses no method of using the bate other than that usually and generally employed in the prior art. In other words, the process in which the dog manure bate and the pancreatic extract bate are used in treating hides is, as admitted by the complainant, one and the same.

"The presence of the enzymes, trypsin and steapsin, in the bating liquid, are the principal constituents that render the bate effective; but these necessary elements were present in the dog manure bate, and practically the only difference between the bate as described by Rohm and the bate which was in common use was the elimination by him of the offensive odor caused by the dung. This being true, can it be said that Rohm invented a new process for bating hides? This must be answered in the negative. There is no patentable novelty in the substitution of one bate even though superior, for another in a well known process. Electric Boot & Shoe Finishing Co. v. Little, *et al.,* 138 Fed. 732, 71 C. C. A. 270." *Rohm v. Martin Dennis Co.,* 263 Fed. 106, at 109-110).

In principle the foregoing decision applies directly to the case at bar. The substitution or addition of tungsten carbide particles for its known properties and characteristics when embedded in steel does not change the method. On the contrary, such change, if it amounted to invention, amounted to invention of a new welding rod and not to a new method, but the order for injunction appealed from is based upon a claim of patent in a new method, not in

a new welding rod. This same principle is illustrated by the decision in *Werk v. Parker* 249 U. S. 130, 63 L. ed. 514. In that case the Court of Appeals, while finding that the change from camel's hair to horse hair mats was sufficient to constitute invention in the art, if this use of horse hair mats was first disclosed by Werk, nevertheless found from an examination of standard works that the patentee's use was but a revival of an old and well recognized use of such mats in the art of oil extraction. This determination the Supreme Court affirmed, saying at 516-7:

> "The burden of petitioner's argument in this Court, as in the application for a rehearing in the circuit court of appeals, is that there was nothing in these publications to show that the horse-hair cloth so familiar in the art embodied the 'structural characteristics' of the oil-press mats of the patents in suit, referring to the peculiar mode of weaving described in the claims. But at the hearing it was clearly proved, and was conceded to be beyond controversy, that the patents involved no claim of an improvement in the art of weaving, but only the application of that art and a combination of threads of a certain type and character in order to produce a particular result. And this, in our opinion, goes no further than a mere mechanical adaptation of familiar materials and methods, not rising to the dignity of invention. Atlantic Works v. Brady, 107 U. S. 192, 200, 27 L. ed. 438, 441, 2 Sup. Ct. Rep. 335; Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 494, 28 L. ed. 222, 223, 4 Sup. Ct. Rep.

220; Hollister v. Benedict & B. Mfg. Co., 113 U. S. 59, 71, 73, 28 L. ed. 901, 905, 906, 5 Sup. Ct. Rep. 717; Aron v. Manhattan R. Co., 132 U. S. 84, 90, 33 L. ed. 272, 274, 10 Sup. Ct. Rep. 24; McClain v. Ortmayer, 141 U. S. 419, 426, 429, 35 L. ed. 800, 803, 804, 12 Sup. Ct. Rep. 76; Duer v. Corbin Cabinet Lock Co., 149 U. S. 216, 222, 37 L. ed. 707, 710, 13 Sup. Ct. Rep. 850; Wright v. Yuengling, 155 U. S. 47, 54, 39 L. ed. 64, 67, 15 Sup. Ct. Rep. 1; Olin v. Timken, 155 U. S. 141, 155, 39 L. ed. 100, 105, 15 Sup. Ct. Rep. 49; Market Street Cable R. Co. v. Rowley, 155 U. S. 621, 629, 39 L. ed. 284, 288, 15 Sup. Ct. Rep. 224."

The same principle was applied by this Court in *Kasser Egg Process Co. v. Poultry Producers of Central California,* 50 Fed. (2d) 141, in which this Court affirmed the holding of the trial court that both of the patents in suit were void for want of invention, saying at 151:

> "All that patentee Henderson did was to select and substitute a more highly purified mineral oil for the oil previously used in a well known process for preserving eggs."

See, also:

> *A. O. Smith Corporation v. Petroleum Iron Works,* 73 Fed. (2d) 531, 536—C. C. A. 6th.

In the case of *David E. Kennedy, Inc., v. Beaver Tile & Specialty Co.,* 232 Fed. 477, Judge Learned Hand denied patentability as a method or process where applied to a new material, cork, formerly used upon a similar material, wood, saying at 479-480:

"The substitution of a new material in a mechanical combination may, of course, sometimes require invention. Frost v. Cohn, 119 Fed. 505, 56 C. C. A. 185; Frost v. Samstag, 180 Fed. 739, 105 C. C. A. 37. But generally the rule is otherwise. Especially ought this to apply to a process patent, where the same process is used upon another material. I do not mean to say that it may not require invention to see the applicability of an old process to a new material. It may take the highest; but I do think that, generally speaking, it will not do so, especially where the method operates in the same way and effects the same results. In the case at bar, the results of the process are precisely the same, whichever material you use, except, of course, that you finish with the same material with which you started.

"In Brown v. District of Columbia, 130 U. S. 87, 9 Sup. Ct. 437, 32 L. ed. 863, Cowing, the patentee, had got a patent for a method of making street pavements, which was to lay wooden blocks made in the form of frusta of square pyramids and to fill in the square so left open with earth and gravel. In the prior art Chambers had a patent for the same thing in stones, the filling to be anything insoluble in water; Lindsay had a patent of the same sort, the interstices to be filled with small stones and grout; and Nicholson had a patent for blocks of wood spaced by pieces of wood to be filled with concrete. The Supreme Court held that, as the change between Cowing and Chambers or Lindsay was merely a change in material, without any new mode of construction or new result, the patent was void."

The Court of Customs and Patent Appeals in *In re Dreyfus,* 65 Fed. (2d) 472, 473, said:

> "Upon the whole, we think the fair and proper construction of the Board's decision is that the claims are rejected in the light of the prior art cited, because processes of dry spinning are already patented to appellant and others and were known to the art, and he has added no new feature to the process of dry spinning itself by adding an additional ingredient to, or making changes of ingredients in, the solution which he spins.
>
> "It is our opinion that the conclusion reached by the Board of Appeals is correct. Had appellant presented claims for the product, or were this a chemical case, the issue might be different, but we fail to discern wherein any new step is added to the method considered purely as a method.
>
> "The method of dry spinning described generally in the first part of this opinion is, it seems to us, defined in detail in the earliest of appellant's prior patents, cited as a reference—patent No. 1,616,787, granted February 8, 1927, and variations as to ingredients of the dry-spinning solution are named in the other references.
>
> "Even if it be conceded as appellant insists, that 'the less volatile non-solvents and still less volatile solvents do evaporate during spinning,' we fail to see wherein this adds anything over the prior art to the spinning as a process. See *In re* Bronson, 40 F. (2d) 575, 17 C. C. P. A. 1189; *In re* Luten, 32 App. D. C. 599; Kasser Egg Process Co. v. Poultry Producers of Central California (C. C. A.) 50 F. (2d) 141; Rohm *et al.* v. Martin Dennis Co. (D. C.) 263 F. 106, affirmed by the U. S. Circuit Court of Appeals of the Third Circuit in 263 F. 388."

LACHES AN ESTOPPEL.

The motion for injunction *pendente lite* should have been denied because of plaintiff's laches. The method patent in suit was granted May 5, 1931. This suit was not filed or motion made for injunction until July 1, 1935, over four years thereafter. Plaintiff-appellee has had full knowledge of appellant's alleged infringement since prior to January 31, 1931, four and a half years before any suit was brought or motion for injunction made. The facts are undisputed and shown by letters from appellee's attorneys to appellant. [See R. pp. 42-47.] Plaintiff-appellee elected to stand upon the said welding rod patent No. 1,757,601, and upon September 19, 1931, wrote appellant [R. p. 47]:

> "We are at present awaiting a decision of an infringement suit based upon patent No. 1,757,601, of which you are undoubtedly aware as one of your employees was quite regular in attendance in the Court Room during the trial. In the event that the decision in this suit is to the effect that this patent is invalid it is, of course, the intention of our client to let the matter drop as it is neither our client's policy nor ours to harass competitors on an invalid patent."

This statement is of special significance and is to be interpreted in view of appellee's letter of June 29, 1931 [R. p. 45], wherein appellee's attorneys state:

> "Since we last wrote you, our client has also received patent No. 1,803,875, which has a close bearing upon patent No. 1,757,601. We are enclosing a copy herewith and ask that you discontinue infringement of this patent also. We would appreciate your acknowledging receipt so that we may establish notice to you of this patent as of this date."

"Up until the present time our client has adopted the policy of refraining from bringing suit against other infringers of patent No. 1,757,601 until the Cause now pending has been decided."

The final policy adopted and communicated to appellant on September 19, 1931, was, as stated in the letter of that date: "In the event that the decision in this suit is to the effect that this patent is invalid, it is, of course, the intention of our client to let the matter drop," etc.

By such notice and correspondence appellee intended appellant to understand, and appellant did understand, that the decree in said welding rod patent suit should and would finally end appellee's assertion of infringement, including all three patents referred to in the correspondence. The verified answer of appellant, used on the hearing as an affidavit, sets forth in paragraph 20 [R. pp. 56-59]:

"20. Defendant further avers that plaintiff caused its attorneys on or about January 31, 1931 to give notice to defendant of said prior Letters Patent No. 1,757,601, charging defendant with infringement of the same through sale of defendant's mild steel welding rod containing pieces of tungsten carbide; that defendant on June 24, 1931 denied that said acts constituted infringement of any valid claim of said Letters Patent No. 1,757,601; that plaintiff on or about June 29, 1931, caused its attorneys to write defendant mentioning Letters Patent in suit No. 1,803,875 without charging that defendant was infringing the same; that on September 9, 1931 defendant replied to plaintiff's attorneys stating that defendant's attorneys advised that defendant might disregard said Letters Patent in suit so far as defendant's present and pros-

pective products and practises were concerned; that on or about September 19, 1931 plaintiff caused its attorneys to send in reply to said letter of defendant a letter reading as follows:

'Hazard & Miller
Attorneys and Counsellors
Patents and Patent Causes
Central Building
Los Angeles

Sept. 19, 1931.

'Haynes Stellite Company,
Kokomo, Indiana.

Attention Mr. E. E. LeVan

'Gentlemen:

We have your letter of September 9th concerning our client's patent No. 1,803,875. In order that laches can in no way be imputed to our client, we wish to set forth our client's position.

We are at present awaiting a decision of an infringement suit based upon patent No. 1,757,601, of which you are undoubtedly aware as one of your employees was quite regular in attendance in the Court Room during the trial. In the event that the decision in this suit is to the effect that this patent is invalid it is, of course, the intention of our client to let the matter drop as it is neither our client's policy nor ours to harass competitors on an invalid patent.

On the other hand if the decision should be in our client's favor, establishing the validity of the patent, it is our client's intention to immediately proceed against all infringers. We trust that you will appreciate our client's position.

We merely wish to inform you of this so that although some time may elapse before this matter is

brought to your attention further, no laches can be imputed to our client's delay in immediately proceeding.

Yours very truly,
HAZARD & MILLER,
(Signed) Per Fred H. Miller.'

"By said letter plaintiff meant and was understood by defendant as meaning, that plaintiff was awaiting the decision in the suit brought by plaintiff against Mills Alloys, Inc., *et al.,* and then pending in this Court, and that no suit would be brought against defendant on the Letters Patent in suit if said prior Letters Patent No. 1,757,601 were held invalid in said suit against Mills Alloys, Inc., *et al.;* that the defendant relied on said representation and meaning and continued the acts now alleged to infringe in said reliance and in the belief that said prior Letters Patent No. 1,757,601 would be held invalid; that said prior Letters Patent No. 1,757,601 were held invalid in said suit brought by plaintiff against Mills Alloys, Inc., *et al.,* and such holding affirmed by the United States Circuit Court of Appeals for this Circuit December 4, 1933; that in reliance thereon defendant has continued and developed its business in the sale of welding rods which is now alleged to infringe the Letters Patent in suit, and has invested large sums in such business; that the plaintiff has failed until after the filing of the bill of complaint herein to give any notice or warning that it desired to withdraw said representation or that it intended to sue this defendant for infringement of the Letters Patent in suit in spite of the decision holding said prior Letters Patent No. 1,757,601 invalid; that the present withdrawal of said representation and the enforcement of the Letters Patent in suit which the plaintiff seeks herein would cause the defendant great damage and injury

> and would destroy the business which the plaintiff has thus encouraged and permitted the defendant to develop, would result in an unjust enrichment of the plaintiff and gross inequity as between the parties, and that the plaintiff is thereby estopped to bring or prosecute the present suit or to interfere in any way under cover of the Letters Patent in suit with the defendant's said business, and the plaintiff is further debarred by its laches."

These facts are uncontroverted and unexplained. Not only is laches shown, but the appellee is estopped to now assert either validity or infringement of the method patent. This is particularly and peculiarly true in this case because the injunction in this case enjoins defendant from doing the identical things that an injunction enjoining infringement of said welding rod patent would prohibit. The charge of infringement in this case is that of contributory infringement by the making and selling of the welding rod. Had the welding rod patent been held valid, the injunction would have prohibited the making and sale of the welding rod. Appellee's statement in the letter of September 19, 1931, is to be interpreted, and was interpreted by defendant, in view of such fact. The welding rod patent having been held invalid, and appellant having relied upon appellee's statement, appellee is estopped from asking an injunction prohibiting the manufacture and sale of such welding rod. After the welding rod patent had been decreed invalid, appellee changed front and subsequently, and four and a half years after learning of appellant's manufacture and sale of the welding rod, brought

this suit and moved for injunction. Obviously, appellee and appellee's attorneys thought so little of this method patent or of any possibility of sustaining its validity, that they decided to stand upon, and advised appellant that they would stand upon, the welding rod patent, admitting that this method patent could not be sustained if said welding rod patent were decreed invalid.

We submit that appellee can not sustain this suit on account of this estoppel, and, furthermore, that the Court was in error in not denying the temporary injunction because of the inexcusable laches of plaintiff-appellee.

CONCLUSION.

We respectfully submit that the order appealed from should be reversed; that the patent in suit is clearly invalid both for want of invention and anticipation; that the bill should be dismissed under the rule of *Mast, Foos & Co. v. Stover Mfg. Co., supra;* that the appellee is estopped from asserting infringement of this patent; and that the temporary injunction should have been denied because of appellee's laches.

Respectfully submitted,

FREDERICK S. LYON,

LEONARD S. LYON,

Attorneys for Appellant.

No. 8119

United States Circuit Court of Appeals

For the Ninth Circuit

HAYNES STELLITE COMPANY, a corporation,

Appellant,

vs.

STOODY COMPANY, a corporation,

Appellee.

ANSWER BRIEF OF APPELLEE

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HAYNES STELLITE COMPANY, a corporation, *Appellant,* vs. STOODY COMPANY, a corporation, *Appellee.*	No. 8119

ANSWER BRIEF OF APPELLEE

STATEMENT

The Appeal Is From an Order for a Preliminary Injunction in an Infringement Suit Based Upon a Patent Previously Adjudicated Valid and Infringed by the Same Court.

The appeal herein is from an order for a preliminary injunction granted in a patent infringement suit brought by Stoody Company, the present owner, of Letters Patent No. 1,803,875, on a "Method of Facing Tools and Resulting Product." (R. 16.)

The patent previously had been held valid and infringed in the case of *Stoody Company v. Mills Alloys, Inc., et al.,* No. Y-101-J, in the United States District Court, Southern District of California, Central Division.

That case was tried before the Honorable David B. Head, Special Master, and the Master's Report was adopted as the Court's Findings by the Honorable William P. James, who is the same judge who granted the order for the preliminary injunction herein.

The record here is not one where there has been "a misapplication of law to conceded facts," nor one where "there is no controverted issue of fact to be determined, and the issues of validity and infringement are questions of law to be determined on the undisputed facts" as contended in "Appellant's Opening Brief," page 4.

Infringement in effect is conceded in the appellant's answer. (R. 48-49.) Validity has been adjudicated in the prior case on the same patent against *Mills Alloys, et al.,* on proofs many times more ample than the fragmentary considerations advanced by appellant in the court below.

Stoody v. Mills, Y-101-J is now on appeal to this court but the record only lately has been filed. That, however, does not detract from its effect as an adjudicated case. *(Treibacher v. Wolf Safety,* (S. D. N. Y.) 215 F. 126.) In the present case the order on appeal was made before the appeal of the adjudicated case.

The affidavits on behalf of defendant below were not of "facts" but of the opinions of an expert as to certain patents. Such affidavits did not present, as claimed in "Appellant's Opening Brief," page 3, facts "uncontroverted and neither impeached nor explained by any evidence or proofs submitted by plaintiff-appellee." The affidavits are controverted by the patents themselves discussed in one affidavit and by the Fact Findings in *Stoody v. Mills,* Y-101-J. (R. 24-38.)

Findings Describing the Method of the Patent

The Master's Findings, adopted by the District Court in the prior suit of *Stoody Co. v. Mills Alloys, et al.,* (a copy of which forms a part of this record) describe the method of the patent herein involved, as follows:

> "The method of the patent relates to the facing of tools, particularly those used for the drilling of oil wells. A mild steel tube of low melting point is filled with particles of a substance of high melting point. Tungsten Carbide is preferred for the substance of high melting point. The tube is then melted by the flame of an oxy-acetylene torch and deposited on the cutting surface of the tool as shown in Figure 3 of the patent drawings. The tungsten carbide particles are not affected by the heat of the torch. As the steel fuses and flows into the weld, the tungsten carbide particles are carried with it. When the steel solidifies the tungsten carbide is found distributed throughout the steel as discrete particles. When the tool is used

these hard particles as they are exposed by wear, become a part of the cutting face of the tool." (R. 25-26.)

The Method of the Patent Is the Application by Welding to the Cutting Edge of a Tool a Layer of Metal in Which Hard Particles Are Embedded to Form an Effective and Durable Cutting and Drilling Face.

The patent describes the applying of the composite material to the tool to be faced, as follows:

> "A layer of metal 5, in which the particles 2 are embedded, is deposited thereon by melting the end of the welding rod by any suitable means such as an acetylene torch indicated at 6." (p. 1, ll. 56-60.)

These particles are described as

> "an alloy or element of a considerably higher melting point than the mild steel of which the tube 1 is composed." (p. 1, ll. 36-38.)

The patent specifies preferred hard material, thus:

> "Though any hard and tough alloy of a considerably higher melting point than mild steel may be used in place of the pieces or particles 2, we prefer to use a carbide of tungsten." (p. 1, ll. 42-45.)

The purpose of using the mild steel as a binder is set out as follows:

> "The object of using a mild tool steel as the tube in the welding rod is to provide a bond or binder for the particles 2 of the hard alloy which bond or binder is fusible at a temperature which

will not cause the alloy to form gases or oxidize, which would result in fissures or blow-holes." (p. 1, ll. 69-75.)

"The mild tool steel forms a bond welded or fused on to the face of the tool." (p. 1, ll. 76-77.)

The harder pieces and matrix

"form an effective and durable cutting and drilling face of the tool." (p. 1, ll. 93-94.)

The Novelty of the Method Is the Applying of a Layer of Heterogeneous Materials of Particular Characteristics by Welding Onto a Tool.

The Patent reads:

"It is an object of this invention to face tools used for cutting, drilling or boring, with a layer of metal in which are embedded pieces or particles of an exceedingly tough and hard material of great wear-resisting properties." (p. 1, ll. 3-8.)

This method of depositing by welding on the face of a tool of a layer of metal in which the harder particles are embedded, forming a heterogeneous deposit, is entirely new. There is nothing like it in the prior art. All welding deposits prior to the patentees' conception of this invention were of an alloy of homogeneous character. There were also inserts—diamonds, and later diamond substitutes—individually calked in place. The Stoodys developed a method known as the "hot rod" method, whereby separate pieces of tungsten carbide were held in position by

added on welded metal. Later they developed the method of the patent in suit.

The Invention Herein Is an Important Advance in the Art of Hardfacing Tools

The development of the heterogeneous layer welding method constituted an important advance in the art over prior processes of welding homogeneous deposits on the edges of well drilling bits and other tools. Those homogeneous deposits were relatively soft as compared with tungsten carbide. The method of the patent in suit was also a considerable advance over the prior practice of calking diamonds and diamond substitutes (tungsten carbide shapes) on the bits. This calking practice, while obtaining harder cutting elements than could be obtained by the hard facing with homogeneous layer forming welding rods was not only very slow and expensive but required highly skilled labor.

Tungsten Carbide has a hardness approaching that of a diamond. But the particles of tungsten carbide, unlike the diamond, may be embedded in welded on steel because they are not affected by the heat of the welding torch in welding the mild steel to the surface of the tool. After the welding operation the hard particles retain their original extreme hardness, and cooperatively with the steel matrix, in which they are embedded, cause rapid penetration of the drill through hard strata in drilling.

The Master finding "*VALIDITY,*" stated in his report, adopted by the District Judge in *Stoody v. Mills,* Y-101-J,

> "In view of the state of the art at the time of the disclosure of the method of the patent it was not known that tungsten carbide and mild steel could be combined together and simultaneously deposited in a weld by the heat of an acetylene torch to produce a weld in which the tungsten carbide particles would be held embedded in a matrix formed by the steel." (R. 35, 36.)

The use of the method of the patent in suit enables a facing to be applied by any welder very easily and quickly with conventional equipment. The small tungsten carbide particles are found distributed close together throughout the steel layer as numerous discrete cutting particles. The resulting product is a more durable tool and enables many times faster and longer drilling.

The Master in adjudicating the validity of the patent in suit, said:

> "*COMMERCIAL SUCCESS* (R. 35)
>
> The Master observed certain demonstrations of the use of the hot rod method and the tube method of applying tungsten carbide. The tube method described in the patent results in a distinct saving in time and a better and more uniform product. Its use has become general in the oil tool industry. The plaintiffs have developed in a short time a large business in the sale of tungsten carbide in tubes under the trade name of Borium."

As to Infringement, the adjudicated case finding is:

> "*INFRINGEMENT* (R. 37)
>
> The defendants are charged as contributory infringers. The defendant corporation, of which the defendant Mills is president and active manager, manufactures and sells welding rods consisting of a mild steel tube filled with particles of tungsten carbide. The defendants' product is intended to be used and is used by the defendants' customers in facing tools by the use of the method of the patent."

As to the infringement by defendant in the present suit, the affidavit of Winston F. Stoody filed in support of the Order to Show Cause sets out (R. 62):

> "That the welding rod purchased by Walter Schumert (of defendant's agent) consists of a steel tube filled with particles consisting principally of tungsten carbide and that, of affiant's own knowledge, these welding rods are being sold and are being used by the trade for the purpose of welding the rods onto well drilling bits and like tools wherein the metal of the tube fuses under the heat of the acetylene torch with the metal of the bit and the particles of tungsten carbide remain unaffected, or substantially so, and are embedded in the matrix formed by the metal of the tube. That the welding rods manufactured and sold by the defendant are the same as those that were being manufactured (R. 63) and sold by Mills Alloys, Inc., and Oscar L. Mills, which formed the basis of the suit 'Stoody Company vs. Mills Alloys Inc., and Oscar L. Mills, in equity No. Y-101-J.'

> Not only are the welding rods of the same appearance as those that were being marketed by Mills Alloys, Inc., and Oscar L. Mills, even to the extent of having the ends of the rods painted red, but in addition thereto the rods produce the same character of weld or deposit on the bits."

The Haystellite Composite rod (R. 75) also constitutes an infringement.

As to these composite rods Mr. Stoody's affidavit reads in part (R. 68):

> "After the plaintiff had placed on the market its welding rods, which were sold under the name of 'Tube Borium', the defendant undertook to place upon the market a tube or welding rod such as that shown on page 12 of the Haynes Stellite catalog, a photostatic copy of which is attached to the affidavit of Walter Schumert. This rod is an infringement of plaintiff's patent . . ."

Defendant's Answer admits the sale of tube and composite rods and the use of the patented method generally by purchasers of defendant's welding rods. (R. 48, subds. 3 and 49, subd. 7.)

ARGUMENT

I.

ON THIS INJUNCTION APPEAL, THE PRIOR DECISION IN THE ADJUDICATED CASE OF STOODY V. MILLS Y-101-J DECIDED BY THE SAME JUDGE WHO GRANTED THE PRELIMINARY INJUNCTION HEREIN SHOULD BE GIVEN THE SAME WEIGHT AS WAS GIVEN IT BY THE COURT BELOW.

On this appeal from an order granting a preliminary injunction, the prior decision of *Stoody v. Mills,* Y-101-J, now on appeal here, decided by the same Judge who granted the order for the preliminary injunction herein, should be given the same weight as was given it by the court below.

The rule in this circuit is expressed by Circuit Judge Wilbur in *Sommer v. Rotary Lift Co., et al.* (C. C. A. 9), 66 F. (2d) 809, as follows:

> "[The] question for the appellate court to consider in an appeal from a preliminary injunction is solely that of whether or not, under the circumstances, the trial court has exercised sound discretion in granting the preliminary injunction. It has been held by the Supreme Court, in Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 495, 20 S. Ct. 708, 44 L. Ed. 856, that upon an appeal from a preliminary injunction the appellate court being satisfied that there was no invention had power

> to order a dismissal of the bill. This, of course, should rarely be done."

See also *Independent Cheese Co. v. Kraft Phenix Cheese Corporation* (C. C. A. 7) 56 F. (2d) 575.

In *Thomson-Houston Elec. Co. v. Ohio Brass Co.,* (C. C. A. 6) 80 F. 712, 730, Judge Taft said:

> "Questions on appeals of this character are ordinarily to be treated in this court from the standpoint from which they were viewed by the circuit court, and the decision on the merits by a circuit court of another circuit sustaining the patent is therefore usually of controlling weight here, as it should be in the court below."

In *American Paper Pail & B. Co. v. Nat'l Folding Box & P. Co.,* (C. C. A. 2) 51 F. 229, 232, the court said:

> ". . . In the absence of some controlling reason for disregarding it, the former adjudication should have the same weight in this court which it has as the foundation for a preliminary injunction before the circuit court."

No such "controlling reason" is suggested here. No prior patent, or prior use or prior publication, having an important bearing upon the validity or construction of the patent, and which was not before the court in the former Mills case, is now presented; no new authority on patent law is now first cited; there is nothing to show an improvident exercise of legal discretion by the district judge, and apparently this is an effort to prematurely review the Mills de-

cision, (rendered after full hearing and which now is on appeal) upon only a partial presentation of the evidence there considered, and without the benefit of cross-examination. There is no warrant for such practice, which was expressly condemned in

Consolidated Fastener Co. v. Littauer et al, (C. C. A. 2) 84 F. 164, 165;

Blount v. Societe Anonyme Du Filtre etc., (C. C. A. 6) 53 F. 98, 100;

Edison Electric Light Co. v. Beacon Vacuum Elec. Co. (C. C. D. Mass.), 54 F. 678, 679.

In the adjudicated case of *Stoody v. Mills,* Y-101-J, the Master not only heard the witnesses and observed their demeanor, but he also saw demonstrations of the actual process of welding on tungsten carbide to various exhibits that were introduced in evidence. The Master was shown by practical demonstration how difficult it was to obtain, or to work out, the method of the patent in suit and how it was that such method was a step in advance in the art, a real contribution now extensively adopted, for which a patent should be sustained. (R. 35.)

There is no new evidence presented herein. The patents in the present record and others like them were fully considered in the prior decision of the adjudicated case of *Stoody v. Mills,* Y-101-J.

The *Chamberlin* patent No. 1,572,349, issued Feb. 9, 1926, (R. 93-95) is for a *cast* rotary core bit with cutting crystals incorporated in one end thereof. This

is Exhibit 1 attached to the Maxstadt affidavit. (R. 83-85, Appellant's Brief, pp. 13-15.)

With regard to this patent the Master found in the adjudicated case of *Stoody v. Mills* on the method patent involved herein, as follows:

> "Other patents teach the use of abrasives by affixing pieces thereof in a matrix of metal. Boxley, Exhibit H-14, teaches the *moulding* of a matrix around a piece of hard abrasive such as carborundum. Marius, Exhibit H-18, Meyers, Exhibit H-24, and *Chamberlin,* Exhibit H-35, follow the same idea." (R. 32.)

The Chamberlin rotary-core drill bit is cast of "aluminum or an alloy thereof, and in its cutting end, an abrasive material is incorporated, such as carborundum crystals." (R. 95, ll. 14-16.)

No welding method is involved, as in the patent in suit, but instead there is a casting of aluminum to incorporate carborundum crystals and another method provides for crystals "first packed into a capsule of readily fusible material, such as lead, zinc, etc., and placed in the bottom of the mold . . . the heat of the cast metal" to melt the capsule. (R. 95, ll. 80-88.) This is a very different process from that of the patent in suit welding on to the face of the tool a layer of mild steel not "readily fusible," in which tungsten carbide particles become embedded.

The method of making the Chamberlin cast bit is unsuitable for incorporating tungsten carbide particles in the cutting end of a bit.

Such a method does not carry out nor hint at the method described in claim 5, "supplying heat to the associated mass to cause the metal of low melting point to melt and be *deposited on* the tool and *carry with* it the pieces of hard substance *depositing* them *on* the tool."

Pouring molten metal onto a fusible capsule of lead or zinc in the bottom of a mold is the antithesis of welding a layer of steel, wherever needed, by its deposit, carrying with it particles of tungsten carbide and embedding them in it when cooled.

The theorist, Professor Maxstadt, defendant's expert, ignores the practical difference between casting with aluminum with a melting point of 1215° F. and welding mild steel with a melting point of 2600° F. using a welding torch with a heat of 6000° F. in the cone of the flame.

The *Ringstrom* patent No. 604,569, issued May 24, 1898 (R. 97-100) is Exhibit 2 attached to Maxstadt affidavit. (R. 86-89, Appellant's brief, 16-17.) This patent is for "Grinding, Abrading, or Cutting Material and Mode of Preparing Same." The method of this patent consists "in first coating each particle or grain of the abrading material with metal, then mixing the coated particles with molten metal or metallic alloy, and then *casting* the mass to give it the proper form." (R. 99, ll. 32-37.) It has no resemblance to the method of the patent in suit. It is similar to the casting

patents, such as Chamberlin, mentioned in the quotation from the Master's report above. (R. 32.)

The German patent to *Siemens & Halske,* No. 427,-074, issued March 23, 1926 (R. 101-102, translation 103-105) Exhibit 3, attached to the Maxstadt affidavit (R. 89, Appellant's Brief, p. 10) is a method for preparation of alloys for implements.

The finding in the adjudicated case is:

> "The German patent No. 427,074, Exhibit V, is directed to the introduction of tungsten carbide in granular form into other metals or alloys to increase their hardness. The patent states: 'With some metals we find merely an embedding.' The process consists of introducing tungsten carbide into a mass of molten metal. No mention is made of *welding* or a previous association of tungsten carbide with other materials." (R. 33.)

This German patent to Siemens is for a "method for the preparation of alloys for implements."

There is no teaching in the Siemens patent of simultaneously depositing a heterogeneous composition by welding onto the cutting edge of a tool.

The British patent No. 27,954 of 1908 to *Morrison,* discussed in the Maxstadt affidavit for defendant (R. 89) set out as Exhibit 4 to that affidavit (R. 106-107, Appellant's brief, pp. 21-22) is for applying homogeneous hard facing to cutting tools. This patent is not cited in the Mills case, but other methods and patents

to accomplish like purpose are discussed by the Master under the heading "Prior Art." (R. 27.)

While Morrison mentions "applying the extremity of the high grade steel while in a state of semi-fusion to small particles of such metal or metals or their oxides (as nickel, *tungsten,* chromium, manganese and the like) that a little of such metal or metals or their oxides may adhere thereto," he is careful to state that he shall "finally well fuse all round the completed nosing until thorough and homogeneous incorporation is secured." (R. 107, ll. 29-34.)

This method accomplished the same old result that the Master referred to in discussing the prior art practices, stating:

> "One method was to weld a layer of hard homogeneous alloy such as stellite or stoodite." (R. 27.)

The affidavit of Defendant's expert states:

> "The Morrison patent discloses completely what has been referred to in the Stoody-Mills litigation as the 'hot rod' method." (R. 90.)

The Master described the "hot rod" method as follows:

> "In this method the welder uses tungsten carbide particles, usually of pea size, an acetylene torch and a mild steel welding rod. He uses the torch to bring the tool surface to a molten state.

> He then heats the welding rod until the end is molten and then presses the molten end of the rod down on a piece of tungsten carbide causing the piece to adhere to the rod. He then transfers the rod to the tool face and with the torch melts off the portion of the rod together with the tungsten carbide particles. Sufficient steel is melted off to form a matrix around the tungsten carbide. This is repeated until a sufficient number of pieces have been set on the tool face." (R. 29.)

This is not the method of Morrison, which welds a layer of high grade steel on to a mild steel surface "until a thoroughly incorporated and homogeneous weld is secured." (R. 107, ll. 8-9.)

The hot rod method involves three materials, two of which are welded together, the weld anchoring a third, which remains unchanged—tungsten carbide particles. The Morrison patent involves only two welded together with any extraneous material melted and dissolved therein so as to lose its identity.

Mills patent No. 1,650,905, Nov. 29, 1927 (R. 117-120) is also discussed in Appellant's Brief, p. 21. The Master in discussing this patent stated (R. 27-28):

> "Prior to the use of the method of the patent drilling tools were faced with hard materials in several ways. One method was to weld a layer of hard homogeneous alloy such as Stellite or Stoodite. The material was cast in rod form and deposited (R. 28) by welding with the electric arc or acetylene torch. Other rods of composite ma-

terials were designed for the same use with the exception that the materials formed an alloy when fused during the deposition. The Mills Oxite Rod is an example.

"This rod is made in the form illustrated in Figure 3 of the Mills Patent, Exhibit H-1. (R. 117.) A mixture of tungsten, ferro-tungsten and other materials in powdered form was placed in a mild steel tube and baked for several hours at a red heat. It was intended that the rod be used with an acetylene torch to produce a homogeneous alloy in the resulting weld. At times the weld produced was rough in appearance due to the failure of all the material to fuse under the heat of the torch. The materials forming the unfused portions of the weld have not been identified. No embedding of hard particles was either intended or appreciably accomplished. The use of the Oxite rod did not anticipate the method of the patent. In the decision of the Patent Office in the interference which will be referred to hereafter the Mills Oxite rod is thoroughly and carefully considered."

From the foregoing it appears that the patent herein has been fully adjudicated in a prior case on evidence which is only partially presented here. But, even upon such partial presentation the invention is shown to be one of merit and the patent valid, and infringed by defendant herein.

II.

THE PRIOR ADJUDICATION AS TO THE WELDING ROD IS NOT IN CONFLICT WITH AND DOES NOT AFFECT THE SUBSEQUENT ADJUDICATION OF THE VALIDITY AND INFRINGEMENT OF THE METHOD PATENT.

In the case of *Stoody Company v. Mills Alloys, Inc., et al.,* R-94-M Master Head found the patent on the tube or rod invalid. That case was affirmed (C. C. A. 9) 67 F. (2d) 807.

In a second case by *Stoody Company v. Mills Alloys, Inc., et al.,* Y-101-J the same Master, to wit: Master Head, finds the patent on the method valid and infringed. This is the case relied upon by Appellee herein as an adjudication of the patent to sustain the order for the preliminary injunction now on appeal in this court. In the second Mills case it was found that the invalidity of the welding rod patent "does not detract from the merit of invention here claimed." (R. 36.)

There is no question of law, independent of fact issues, upon which the Appellate Court herein can pass. Even the effect of the decision on the rod patent which was affirmed on appeal by this court, 67 F. (2d) 807 requires a determination of the facts as to what the issues and evidence were in that case. Such facts were considered in the second case of *Stoody v.*

Mills, Y-101-J, on the Method Patent involved herein and determined adversely to the Appellant's contentions herein, and that determination is in evidence in the record. (R. 25, 33-35.)

The Special Master in his report in the second Mills case, Y-101-J, has misconstrued neither his findings nor the decision of this court in *Stoody v. Mills Alloys, Inc.,* 67 F. (2d) 807, as contended in Appellant's Brief, pages 18 et seq. The Master and District Judge find the two cases as a matter of fact to be in harmony.

The Special Master in his report in the second Mills case Y-101-J did not decide it erroneously, as contended in Appellant's Brief, page 18, on an issue of priority of assumed invention of the so-called "Hot Rod" method, nor was such issue held by him to be determinative of the case. The Master stated:

> "(The) hot rod method was neither an anticipation or a part of the prior art insofar as the method of the patent is concerned." (R. 32.)

The prior decision of the Circuit Court of Appeals in the welding rod patent case does not in any way conflict with the decision by Master Head, approved by the lower court in the second Mills case and relied upon in the present case to support the preliminary injunction involving the method patent herein.

The first prior Mills decision did not pass in any way upon the invention of the method here involved. It passed only on the record as it was brought before the Appellate Court in that case, affirming the Mas-

ter's Findings as supported only by such evidence as was in that record.

In the second Mills case the findings as to the first Mills case are:

> (R. 33) "The defendants set up the decree in this case under their plea of *res adjudicata.* The action was between the same parties on a patent the claims of which read on the welding rod which (R. 34) preferably is used in carrying out the process of the patent in suit. Claim 3 of the welding rod patent reads:
>
> > '3. A welding rod comprising a metal of comparatively low melting point and pieces of an alloy containing tungsten and carbon associated therewith.'
>
> "The Master reported in that case that the patent was invalid for want of invention over the prior art. The report at lines 21 and 22, page 8, specifically points out that no process claims were involved.
>
> "One finding of fact in that case differs from a finding herein. In the first case a finding was made that the hot rod method was prior to the invention claimed. This finding resulted from a colloquy between counsel and the Master. This colloquy is copied in Plaintiff's Reply Argument to Defendant's Objection to Plaintiff's Interrogatories found in the file of this case. Although the remarks of plaintiff's counsel are equivocal the colloquy in effect resulted in a stipulation insofar as the issues in that case were concerned. Neither party should be bound by that stipulation

in this action. The evidence in this case tends to further support the findings in the prior case as it appears that once the process of the patent was conceived the prior art was fully ready to provide the physical structure for combining the materials to be welded.

"At the time the first case was tried the patent in suit had not issued."

. . .

"Defendants have cited cases such as Vapor etc. v. Gold, 7 F. (2d) 284 which are not in point. In that case it was held that plaintiff was estopped from setting up claims that could have been set up in a prior suit. The patent in suit had not issued at the time of the first case and obviously no cause of action had accrued." (R. 35.)

The Method of Welding Is Patentable Independently of the Welding Rod Used Therein

The patentees herein conceived that it might be possible to associate small particles of tungsten carbide with mild steel, and by means of a welding torch, to deposit simultaneously the mild steel and tungsten carbide particles on the cutting edge of a bit in a welded layer with the particles embedded therein without materially changing their identity. Having so conceived, one of the means of association of materials, to wit: the welding rod was held by this court in 67 F. (2) 807 not to constitute invention.

A process may be patentable while the mechanical device used in practicing it may not be patentable.

Nestle-LeMur v. Eugene, (C. C. A. 6) 55 F. (2d) 854, 856, 857, approved;

Gen. Elec. Co. v. Save Sales Co., (C. C. A. 6) 82 F. (2d) 100, 103.

A patent for a new and useful process is not invalid because of lack of novelty disclosed in the mechanical means used for practicing it.

Cochrane v. Deener, 94 U. S. 780, 787, 788; 24 L. ed. 139, 141.

In the case of *Naivette v. Bishinger* (C. C. A. 6) 61 F. (2d) 433, 436, 437, the court held the patent claims on a hair clamp were void and the claims on the process of waving the hair in which the clamps were used, were valid.

In finding the claims covering the device invalid, the court in the case cited, said, 61 F. (2d) 436:

> "There is no contradiction in sustaining the validity of a process . . . and yet deny validity to the patent for a clamp as a unitary device."

The Master in the second case of *Stoody v. Mills,* Y-101-J, follows the same line of logic, stating:

> "Once having found that conception (of the method of the patent) they (the inventors) were equally at liberty to draw upon the prior art for the means by which the materials to be welded could be associated together. That the physical

structure of the tube in carrying out their method was not an invention in itself did not detract from the merit of invention here claimed." (R. 36.)

Neither the Prior Art of the Welding Rod Case Nor the Hot Rod Method Affects the Merit of the Method Patent Herein.

The Appellate Court in the welding rod case relied upon the findings of the Master summing up the prior art at the time of the appearance of the welding rod of the patent, and quotes the Master's findings as follows:

> "(1) It was common practice to combine in rod form various substances intended for deposit in a weld and to use a steel tube filled with alloying substances for that purpose.
>
> (Illustrations in this record Jones (R. 115) and Mills (R. 28 and 117).)
>
> "(2) It was known that tungsten carbide could be used advantageously in hard-surfacing cutting tools.
>
> (Use at Stone plant calking in diamond substitutes. (R. 28).)
>
> "(3) It was known that tungsten carbide was not materially affected by a temperature of a degree of the acetylene torch and that it formed a bond with mild steel or other matrix metals."

With reference to knowledge that tungsten carbide was not materially affected by the heat of the torch, a finding was refused in the first Mills case as

to whether or not this knowledge was discovered by others, or by the patentees themselves within two years prior to their application for the patent in suit. But in the second case adjudicating the method patent, the subject was more fully developed and the same Master in that case found that the patentees themselves were the ones who developed this knowledge. He states:

> "Some time prior to June, 1927 Shelley Stoody had learned that tungsten carbide was not appreciably affected by the heat of the acetylene torch." (R. 27.)

Later findings show this to be the first knowledge of such characteristic.

Shelley Stoody made this discovery in developing the "hot rod method."

In the first Mills case insufficient exception under Rule 11 of this court and Equity Rule 46 was taken to the rejection of evidence by the Master as to the originator of the "hot rod" method, the Master taking the position that it was immaterial who originated it. (Vol. II, case 7059, p. 541, 67 F. (2d) 813.)

In the method patent case, this same Master heard the second Mills case fully, including the evidence which was barred in the first case, together with other evidence, and concluded:

> "The conclusion is reached that there was no use of the hot rod method at the Stone plant prior to the use of that method by the Stoodys." (R. 32.)

As to the hot rod method and knowledge developed by the Stoodys, the Master in the method patent case, relied on herein, made the following finding:

> "The use of the hot rod by Shelley Stoody and others in the Stoody plant did not constitute a prior public use. While it was still their own, the Stoodys and Cole (the inventors herein) could use that knowledge in the future development of their ideas. *Eck v. Kutz,* 132 Fed. 758; *In re Peiler,* 65 Fed. (2d) 984." (R. 32.)

The fact that tungsten carbide is not materially affected by the heat of the torch was not known until Shelley Stoody discovered it in making his experiments. Tungsten carbide, known as "Thoran," a German metal, had been in use in the Stone plant since late in 1925, which was some considerable time prior to the development of the hot rod method by Shelley Stoody. The Master found with respect to its use in the Stone plant where it was calked into holes prepared for that purpose on the bit cutting edge:

> "In this operation the flame of the welding torch was kept away from the Thoran as much as possible from fear of damage to the Thoran." (R. 29.)

It, therefore, was not obvious that tungsten carbide, particularly the small particles, could be subjected to the heat of a welding torch in welding on other material such as mild steel to attach tungsten carbide particles to the cutting edge of the tool. Even after

the discovery by the Stoodys that the larger pieces could be so attached by the hot rod method, it was not apparent that the smaller particles would not amalgamate with the other materials of a welding rod to form a homogeneous deposit as all other welding rods had done up to that time such as Jones and Mills in this Record 115 and 117. Nor was it known what other material, if any, could be used for that purpose without oxidation taking place.

The first experiments were in 1926 (R. 26) before the Stoodys had learned of tungsten carbide. In February, 1927 they learned of tungsten carbide and some time prior to June, 1927, Shelley Stoody discovered that it was not appreciably affected by the heat of the acetylene torch. (R. 26-27.)

The Master finds as to further experiments as follows:

> "Under the direction of the Stoodys several experiments were conducted by Cole in an effort to combine tungsten carbide particles with other materials in a welding rod. None of these experiments resulted in a useful rod. It has been satisfactorily established that during the latter half of June, 1927, a rod containing *tungsten carbide particles enclosed in a mild steel tube* was made in the Stoody plant and that this rod was used to face a so called Zubelin bit . . . This Zubelin bit was run successfully in a well and afterwards returned to the Stoody plant.
>
> "This was the first successful use of the method of the patent and for the purpose of this case may

be considered as the date of the invention." (R. 27.)

It is not true, as stated page 8 of Appellant's Brief, that the patentees chose particles of tungsten carbide "because of the (prior art) knowledge that if tungsten carbide products were intermingled with steel of a lower melting point, the steel would be melted and fused onto the tool while the tungsten carbide particles would be embedded in such fused steel." This was not known prior to the patentees' discovery thereof and it was so found in the adjudicated method patent case. (R. 35-36.)

Appellant's Brief incorrectly states, page 8, that the "patentees believed they were the discoverers of the fact that tungsten carbide was of excessive hardness; that it was of very high melting point;" Those facts were known before the patentees became acquainted with this metal. They did discover, however, that tungsten carbide, even in small particles, quoting further from Appellant's Brief "if intermingled with steel of lower melting point, melting and fusing the steel" under the direct heat of the flame of the oxy-acetylene torch, "would simply embed the tungsten carbide particles," in the weld. This was an advance of the knowledge then existing that tungsten carbide could be introduced into some kinds of molten metal and become embedded.

The fact that tungsten carbide and mild steel could be associated and simultaneously *deposited in a weld* was not known, and it was so found in the method patent case . (R. 33 and 35.)

The steps of invention were as follows:

First: The conception that different hard materials could be associated and deposited in a weld to form a heterogeneous deposit, to wit: a layer of weldable metal in which hard particles are embedded intact to form cutting elements on a tool.

Second: To carry out that conception, there had to be discovered a suitable hard material which, in small particles, would not be materially affected by the flame of the welding torch in welding the associated metal to the face of the tool. Stoodys discovered that tungsten carbide, an extremely hard material, would not crack or shatter when subjected to the flame of the torch, nor would it oxidize, nor lose its temper, and that even in small particles it would not form an alloy or homogeneous deposit, but would remain hard distinct particles in the weld.

Third: It was also necessary to discover a suitable material to associate with the tungsten carbide particles, and it was discovered by the inventors herein that mild steel was suitable for such association to weld to the tool face, carrying with it into the weld the tungsten carbide particles without forming gasses and without oxidizing, and on cooling, binding the hard particles in place. (Patent p. 1, ll. 73-77.)

The finding in the adjudicated case is (R. 35).

> "In view of the state of the art at the time of the disclosure of the method of the patent it was not known that tungsten carbide and mild steel could be combined together and simultaneously deposited in a weld by the heat of an acetylene torch (R. 36) to produce a weld in which tungsten carbide particles would be held embedded in a matrix formed by the steel."

Never before Stoodys' own experiments had tungsten carbide particles been associated with any metal to be welded onto the cutting edge of a tool or bit. *It was thought that this could not be done;* that the particles would dissolve or melt and form an alloy as in previous methods using composite welding rods. It was thought that these particles would be affected by the heat of the torch, would oxidize or that gases would form fissures or blow holes in the weld. Stoodys discovered that this could be done with mild steel; that the mild steel when melting protects the tungsten carbide particles from the air, thereby preventing oxidizing, and that the small particles would not melt and form an alloy.

Then after the deposit has cooled:

> "The mild tool steel forms a bond welded or fused onto the face of the tool." (Patent p. 1, ll. 76-77.)

This welded bond of mild steel holding embedded a large number of small cutting particles close together forms "an effective and durable cutting and drilling face of the tool." (Patent p. 1, ll. 92-93.)

It is this method of forming a heterogeneous welded deposit that is entirely new; there is nothing like it in the prior art.

The Method of the Patent in Suit Is a Patentable Process Being a "Method of Treatment of Certain Materials to Produce a Particular Result or Product."

General Foods Corporation v. Broder, (C. C. A. 9) 80 F. (2d) 492, 494.

The present process utilizes to advantage the discoveries that tungsten carbide will not be materially affected by the flame of the torch in welding, and that in association with mild steel there is a cooperation of these materials in welding in a different manner from that of other materials of other welding rods producing a particular result and product, to wit: a layer of heterogeneous material on the cutting edge of a tool forming "an effective and durable cutting and drilling face."

Expanded Metal Co. v. Bradford, 214 U. S. 366, 53 L. Ed. 1034, 1040, holds that a new combination of old elements or steps in a process producing a new and useful result is invention. There was involved *simultaneous* slitting and bending of material, here the *simultaneous* deposit in a weld of materials discovered to be suitable for that purpose.

In *Beryle v. San Francisco Cornice Co.* (C. C. A. 9), 195 F. 516, 519 affirming 181 F. 692, there was a method of securing ends of material and "then *simultaneously* pushing the wood and metal" thru dies,—held that the saving of time and material made it a proper subject of a patent.

The patent herein discloses a continuous process, a simultaneous action and progressive performance.

Ludington Cigarette Machine Co. v. Anargyros, et al. (C. C. A. 2), 188 F. 318, at p. 322, emphasizes such features as the essence of the invention of a process for making cigarettes, stating that:

> "[If] the combination was new, and a new and useful result was produced, the patentee is entitled to the protection of his process."

In *Vortex Manufacturing Company v. Ply-Rite Contracting Co.,* (D. Md.) 33 F. (2d) 302, 309, the court said:

> "The true test of the patentability of a combination of prior processes is whether there has brought together for the first time their different elements into a unitary whole forming a process that is both new and useful.
>
> "We find that the Parkin patent meets this test. The novelty consists of the application to walls and ceilings of a moisture impervious fluid bond material at normal temperature in conjunction with the application of an inert material, and the plaster."

In the present case there are the same elements of novelty. There is "the application" to tools "of a . . . bond material," mild steel, at a certain "temperature," the heat of a welding torch, "in conjunction with the application of an inert material" the tungsten carbide particles, the elements "being brought together for the first time . . . forming a process which is both new and useful."

It is contended that there is nothing new in plaintiff's method; that it is the same method of welding as is accomplished with other welding rods; that the only thing new is the use of different materials in the tube.

Not only is the tungsten carbide a different material, but its co-operation with the mild steel of the tube is different—bonding but not blending therewith—and the results obtained are different, not only in the welding but in the weld obtained.

The discovery that tungsten carbide, (although a well known material), was suitable for use in the method of the patent and to produce the product, was an element of invention similar to that of selecting tungsten to form a filament for electric lamps, which was held invention in *General Electric Co. v. Laco Philips Co.,* (C. C. A. 2) 233 F. 96.

The substitution of tungsten for molybdenum and platinum made-and-break contacts was held to be invention in *Elkon Works, Inc., v. Welworth Automotive Corporation* (E. D. N. Y.) 25 F. (2d) 968, 972, 973.

The discovery that the mild steel associated with the tungsten carbide permitted the simultaneous deposit of the materials to form a weld without forming gases or *oxidation.* (Patent p. 1, ll. 73-75) was invention just as was the use of a small quantity of *deoxydizing* aluminum in the process of producing iron and steel castings in *U. S. Mitis Co. v. Midvale Steel Co.,* (E. D. Penn.) 135 F. 103.

The court states at page 108:

> "Furthermore, whatever knowledge of the *deoxydizing* property of aluminum there may have been, its utility in producing iron and steel castings without a deterioration of the product certainly was not understood before, *nor yet the time and manner of applying it,* which were also involved. One had to know not merely that aluminum was a deoxidizer like manganese and silicon, but that in marked contrast with both, it could be made to disappear in the process, and leave no bad effect. This it was left to Wittenstrom to discover and give to the world, and it does not do to belittle his achievement after the fact. The process which he evolved may be a simple one—merely casting a bit of aluminum into the molten mass at the moment of pouring—but it is not to be judged by its simplicity, but by its effect (*Carnegie Steel Co. v. Cambria Iron Co.,* 185 U. S. 403, 429, 22 Sup. Ct. 698, 46 L. Ed. 968), and of this we can hardly doubt."

So also in *General Electric Co. v. Hoskins Mfg. Co.,* (C. C. A. 7) 224 F. 464, 467, 471, the court held that

the use of chromium nickel alloy, a new alloy, as an electric resistance element, was invention, having among other characteristics that it was less liable to *oxidation when heated.*

In *Westmoreland Specialty Co. v. Hogan,* (C. C. A. 3) 167 F. 327, 328, the court held that the use of celluloid instead of metal for a dredge cap for salt cellars, which material would *"not oxidize"* and had flexibility and insulating qualities, was invention.

In *Ajax Metal Co. v. Brady Brass Co.,* (D. N. J.) 155 F. 409, the court held it invention to form a composite mixture or alloy of metals which, in the patent there involved, was for journal bearings.

It is urged, however, that the method here, is merely the deposit of metal upon the face of the tool by a process of welding, using a welding rod "in the only way in which that rod could be used," (p. 8 brief) and "no differently from any other welding rod." (p. 9 brief) and that the application of the heat and the deposit of the materials was nothing new.

The physical acts of welding, in performing the operation, are the same, but the process itself is different.—First in the materials associated and deposited; Second, in their reaction to the heat of the torch in welding, and Third, in the result produced.

In discussing *Stoody v. Mills Alloys, Inc.,* 67 F. (2d) 807, Appellant page 6 of its brief stated that "this court held that there was no invention in the manufacture or use of that rod." The decision only holds that there was no invention in the rod.

The method here involved relates to the formation of a cutting tool such as a drill bit and its use in drilling. It is the process of putting a superior cutting edge on a drill bit or other tool. It is not the process of using a certain kind of tube (or rod) any more than it is of using an acetylene torch, although both tube (or rod) and torch are used in the process. Tube and torch are merely instruments or tools used in the process, the essence of the invention being the association and simultaneous deposit of a layer of heterogeneous materials on the cutting edge of a tool producing thereby a new result, a more effective and durable cutting tool.

A part of the problem was to devise a method enabling the use of conventional acetylene torches and established welding technique whereby a facing could be applied to tools wherever desired that would be superior to all previous welded on facings. The discoveries that tungsten carbide would retain its hardness and its identity under the flame of torch and even when carried in a flow of molten mild steel into a weld enabled this problem to be solved. These discoveries are used advantageously in the patented method.

The very fact that conventional apparatus—a welding torch—may be used in the usual manner, for treatment of certain associated materials whose characteristics in combination had been discovered by the patentees, greatly adds to the value of the invention, and materially aided in establishing it in the trade.

Its merit has been passed upon favorably by the lower court in a prior contested case wherein was carefully considered the prior rod patent case and nothing different from the arguments made in the adjudicated suit are offered here by the Appellant.

III.

THERE ARE NO LACHES TO CONSTITUTE AN ESTOPPEL.

It is urged by appellant that inasmuch as plaintiff waited four years with full knowledge of defendant's infringement of its patent before suing it, plaintiff is estopped by laches, and a part of certain correspondence between the parties is referred to in that connection.

The affidavit of Charles G. Scheffler (R. 41) sets out that he is in charge of the patent department of Haynes Stellite Company, the defendant herein. Affiant states on information and belief that the entire correspondence between the Stoody Company, plaintiff herein, and the Haynes Stellite Company regarding plaintiff's patent is composed of the five letters, giving their dates with true copies attached.

The first letter is merely a notice of infringement of patent No. 1,757,601, and patent No. 1,547,842. The first one mentioned is on a welding rod. That letter is dated January 31, 1931. (R. 43.)

The next one is dated June 24, 1931 (R. 44), signed by E. E. LeVan, General Sales Manager, to Hazard & Miller, attorneys, stating:

> "Your letter of January 31, 1931, regarding Stoody patents, Nos. 1,547,842 and 1,757,601, has been referred to our patent attorneys. After a careful consideration, they report that in their opinion we are not infringers, either direct or contributory, or any valid claim of either patent."

This letter does not claim that defendant is not practicing what the patents teach, but apparently relies upon alleged invalidity.

On June 29, 1931, Hazard & Miller wrote defendant (R. 44):

> "We are in receipt of your letter of June 24th in response to our letter of January 31st concerning the Stoody Company patents.
>
> "We do not have the benefit of the reasoning of your attorneys by which they arrive at the conclusion that you do not infringe in any way any valid claims of either patent and we cannot see how they can legitimately arrive at this conclusion. Patent No. 1,757,601 has already been sued upon in this District and the trial has been had. We are at present awaiting decision of the case, which we trust will be in our client's favor.
>
> "Since we last wrote you, our client has also received patent No. 1,803,875 (that is the patent in this suit) which has a close bearing upon patent No. 1,757,601. We are enclosing a copy herewith and ask that you discontinue infringement of this

patent also. We would appreciate your acknowledging receipt so that we may establish notice to you of this patent as of this date.

"Up until the present time our client has adopted the policy of refraining from bringing suit against other infringers of patent No. 1,757,-601 until the cause now pending has been decided. However, we are submitting your case to them for a possible change of policy. This is based upon the assumption that your attorneys after perusing this patent will, likewise, arrive at a similar conclusion, that you do not infringe any valid claim therein. We hope, however, that after investigating this patent that your attorneys will alter their opinion as to all three of the patents mentioned in our correspondence."

Mr. LeVan, the general sales manager, then writes on September 9, 1931 (R. 46):

"Your letter of June 29, 1931, in which you call our attention to an additional patent No. 1,803,875, has been referred to our patent attorneys. They regard this patent as even weaker than its companion No. 1,757,601; and advise us that we may disregard it in so far as our present and prospective products and practices are concerned."

Then comes the letter of September 19, 1931 (R. 49), upon which appellant relies as creating an estoppel or waiver. In the first paragraph it states:

"We have your letter of September 9th concerning our client's patent No. 1,803,875. In order

that laches can in no way be imputed to our client, we wish to set forth our client's position."

And in the second paragraph:

"We are at present awaiting a decision of an infringement suit based upon patent No. 1,757,-601 of which you are undoubtedly aware, as one of your employees was quite regular in attendance in the court room during the trial. In the event that the decision in this suit is to the effect that this patent is invalid it is, of course, the intention of our client to let the matter drop as it is neither our client's policy nor ours to harass competitors on an invalid patent.

"On the other hand, if the decision should be in our client's favor, establishing the validity of the patent, it is our client's intention to immediately proceed against all infringers. We trust that you will appreciate our client's position. We merely wish to inform you of this so that, although some time may elapse before this matter is brought to your attention further, no laches can be imputed to our client's delay in immediately proceeding."

There is no statement in any of these letters that plaintiff would not proceed upon the patent in suit or that the method patent would be dependent upon the decision in the Circuit Court of Appeals on the welding rod patent. It was not long after this last letter that another suit on the method patent was instituted agains Mills. This second suit was brought against Mills instead of against the Stellite Company because,

as stated in one of plaintiff's affidavits here (R. 68), the Haynes Stellite Company was getting out a form of rod which was of such inferior character and so unattractive to the public that it was not creating very much competition at that particular time. But it appears that defendant later adopted a tube-rod which is in all respects the same as the tube-rod of the Stoody Company.

In connection with this matter of delaying suit until after the case of Stoody against Mills was determined, no suit was brought against defendant herein until after decision in the second Mills case had been made.

Walker on Patents, Sixth Edition, Section 631, page 727, speaks of this matter of delay as follows:

> "[Delay] to sue is not always laches, because it may have been harmless to the defendant; or it may have resulted from the fact that the complainant did not know of the infringement till long after it began; or from the fact that he was litigating a test case under his patent against another infringer during the time of the delay."

This last is just what plaintiff did here.

One very significant thing appears. Although plaintiff's letter (R. 47), speaks of defendant having a man in attendance on the first trial, there is no denial on their part that they knew that plaintiff was litigating the case against Mills on the second or method patent.

Timolat v. Franklin, (C. C. A. 2) 122 F. 69, holds that the patent owner is under no obligation to sue all infringers at the same time. That would not seem to be good business policy. A test case should first be made before suing at large, so to speak.

Defendant here, after notification of the patent now in suit, wilfully elected to continue its infringement at their own and known peril, on the ground that it had no validity. They did not rely upon any consent on the part of plaintiff that they might do what they have done.

In *Pierce-Smith Converter Co. v. United Verde Copper Co.,* (D. Del.) 293 F. 108, 113, the court stated:

> "Laches is not like limitation, a mere lapse of time, but is principally a question of the inequity of permitting a claim to be enforced because of some change in the condition or relations of the parties or the property. Basic converting was begun by the defendant in accordance with the Smith process, without leave of the patentee or his assignee, after being advised by its counsel of probable infringement. The enlargement of its infringing operations is no more attributable to Smith or the plaintiff than was the original infringement."

In *United States Fire Escape Counterbalance Co. v. Wisconsin Iron & Wire Works,* (C. C. A. 7) 290 F. 171, the headnote reads:

> "Delay in bringing suit against an infringer *held* not laches, which barred the suit, where dur-

ing the time of defendant's infringement other suits on the patent were pending, and the suit was commenced within six months after its validity was established."

IN CONCLUSION

The question on this appeal is "solely that of whether or not, under the circumstances, the trial court has exercised a sound discretion in granting the preliminary injunction" (66 F. (2d) 809). It appears that the lower court in granting the injunction relied upon its own prior adjudication of the method patent herein which prior adjudication was upon full proofs and extensive consideration. No different or other defense than was made in that prior litigation has been advanced in the present case.

In *Co-Operating Merchant's Co. v. Hallock,* (C. C. A. 6) 128 F. 596 cited by appellant, page 4 of its brief, certain alleged anticipating patents raised grave doubts as to validity of the patent in suit. The Appellate Court however, in view of the "question of anticipation arising upon prior patents and their exemplification by ex-parte affidavits of experts" and the fact "that complainant's patent had been sustained on its merits upon a final hearing" "and that every one of the patents here relied on had been in that case" remanded the case with direction to dissolve the injunction "upon the execution of a bond by the defendant."

But in this case such remand should not be made, but the decree affirmed, because the order appealed from permitted defendant to file such a bond. (R. 129.)

The court did not abuse, but exercised a wise and careful discretion in making its order.

The appellant did not avail itself of the provision allowing it to file the bond, but elected to appeal. Therefore, the order appealed from should be affirmed with costs to appellee, and the case remanded without leave to further suspend the injunction ordered, plaintiff having filed its bond as required.

Respectfully submitted,

FRED H. MILLER,
CHARLES C. MONTGOMERY,
Attorneys for Appellee.

No. 8055

United States

Circuit Court of Appeals

For the Ninth Circuit.

COLUMBIA RIVER PACKERS ASSOCIATION, a corporation, BAKER'S BAY FISH COMPANY, a corporation, and H. J. BARBEY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE STATE OF OREGON, and THE STATE OF WASHINGTON,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8055

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF THE ATTORNEYS OF RECORD:

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and
JAY BOWERMAN,
910 Yeon Building, Portland, Oregon,
for Appellants Columbia River Packers' Association, Baker's Bay Fish Company, and H. J. Barbey.

CARL C. DONAUGH,
United States Attorney for the District of Oregon,
and
EDWIN D. HICKS,
Assistant United States Attorney for the District of Oregon,
506 United States Court House,
Portland, Oregon,
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I. H. VAN WINKLE,
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WILLIS S. MOORE,
Assistant Attorney General of the State of Oregon,
and
RALPH E. MOODY,
Assistant Attorney General of the State of Oregon,
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G. W. HAMILTON,
Attorney General of the State of Washington,
and
R. G. SHARPE,
Assistant Attorney General of the
State of Washington,
Olympia, Washington,
for Appellee, The State of Washington.

In the District Court of the United States
for the District of Oregon

No. E 9471

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COLUMBIA RIVER PACKERS ASSOCIATION, a corporation; BAKER'S BAY FISH COMPANY, a corporation; and H. J. BARBEY,
Defendants.

CITATION ON APPEAL.

The President of the United States of America,
To United States of America, plaintiff, the State of Oregon, and the State of Washington, petitioners for leave to intervene, GREETING:

WHEREAS, the above named defendants Columbia River Packers Association, a corporation,

Baker's Bay Fish Company, a corporation, and H. J. Barbey, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree rendered and entered in the District Court of the United States for the District of Oregon, on the 9th day of August, 1935, in favor of the said plaintiff, United States of America, and against the said defendants, and have given the security as required by law, therefore

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the court room thereof, in the City of San Francisco, State of California, within [1*] thirty (30) days from the date hereof, to show cause, if any there be, why the Findings and Conclusions of said District Court in said cause and said Decree should not be reversed and corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, Oregon, in said District of Oregon, this 1st day of November, 1935.

CHARLES C. CAVANAH
Judge of the United States District
Court for the District of Oregon,
presiding in the above cause. [2]

Due and timely service of the attached Citation on appeal of defendants by receipt of a true copy

*Page numbering appearing at the foot of page of original certified Transcript of Record.

thereof, acknowledged this 3d day of November, 1935.

G. W. HAMILTON
Attorney General of the
State of Washington
R. G. SHARPE
Assistant Attorney General of the
State of Washington
Attorneys for the State of Washington.

State of Oregon,
County of Multnomah,
District of Oregon.—ss.

Due and timely service of the foregoing Citation on Appeal, together with receipt of a copy thereof, duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is hereby admitted at Portland, Oregon this 3rd day of November, 1935.

I. H. VAN WINKLE
Attorney General of the State of Oregon.
RALPH E. MOODY
Attorney for the State of Oregon.

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Citation on Appeal is hereby accepted in Multnomah County, Oregon, this 3rd day of November, 1935, by receiving a copy

thereof, duly certified to as such by A. E. Clark of Attorneys for Defendants.

EDWIN D. HICKS
Of Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 2, 1935. [3]

In the District Court of the United States for the District of Oregon.

March Term, 1935.

BE IT REMEMBERED, That on the 10th day of June, 1935, there was duly filed in the District Court of the United States for the District of Oregon, a SECOND AMENDED BILL OF COMPLAINT, in words and figures as follows, to wit: [4]

[Title of Court and Cause.]

SECOND AMENDED BILL OF COMPLAINT

COMES NOW the United States of America, by Carl C. Donaugh, United States Attorney for the District of Oregon, and Edwin D. Hicks, Assistant United States Attorney, under direction of the Attorney General of the United States, and, after leave of court having been duly had and obtained, files this, its Second Amended Bill of Complaint, and for its cause of suit against the above-named defendant alleges:

I.

That on the 21st day of October, 1864, the Legislative Assembly of the State of Oregon passed an Act entitled:

"AN ACT to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned.

"Section I. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow, between high and low tide, and also to Sand Island, situate at the mouth of the Columbia River in this State; the said island being subject to overflow between high and low tide."

That ever since the passage of said Act, plaintiff has been in possession of said Sand Island and has so possessed the same as a military reservation of the United States and is now the exclusive owner thereof and entitled to the immediate and exclusive possession thereof. [5]

II.

That during all the times herein mentioned said Sand Island was located within the estuary of the Columbia River, United States of America, within Clatsop County, State of Oregon, and within the jurisdiction of this Court.

III.

That the said tract of land called "Sand Island" is located and described upon a certain official map and chart prepared by the War Department of the United States for the year 1933, which said official

map and chart of said Sand Island, showing the location thereof in the said Columbia River and within the State of Oregon, and also showing the location of the said main north channel of the Columbia River, is attached to the original bill of complaint filed herein, marked Exhibit "A", and the same is by reference made a part of this second amended complaint, which said Exhibit "A" shows the location of said Sand Island to be east and south of the said north ship channel of the Columbia River.

IV.

That the waters of the Columbia River adjacent to Sand Island and are frequented by salmon, and the beach or spit on the west and southwest end of Sand Island is peculiarly adapted to the drawing of seines and floating fishing gear,and said waters are immensely valuable for the purpose of seining for salmon.

V.

That during all the times herein mentioned the defendant, Columbia River Packers Association, was and now is a corporation, organized under the laws of the State of Oregon and engaged in the business of fishing for salmon and owning and operating canneries, and the defendant, Baker's Bay Fish Company, is a subsidiary corporation of said defendant, Columbia River Packers Association, and all of the capital stock thereof is owned and/or controlled by said defendant, Columbia [6] River Packers Association, so that the said Baker's Bay

Fish Company is the corporate agent of said Columbia River Packers Association.

VI.

That during all the times herein mentioned the defendant, Baker's Bay Fish Company, was and now is a corporation organized under the laws of the State of Washington, engaged in the business of fishing in the waters of the Columbia River hereinafter described.

VII.

That on or about the 1st day of May, 1930, the defendants, H. J. Barbey and the Columbia River Packers Association, a corporation, leased from plaintiff, for seining purposes only, for a period of five years, the land on the south side of Sand Island, which is described as Sites No. 1, 2, 3, 4, and 5 in said lease, and which is well known to all of the defendants herein, and which is more particularly described and mapped in that certain cause of Strandholm v. Barbey, 144 Or. 705, 26 P. (2d) at page 48, to which reference is hereby made, and the same is hereby incorporated herein by this reference the same as if said descriptions were fully impleaded herein.

VIII.

That defendants, after having occupied said Sand Island under the terms of said lease for two successive seasons, to-wit: for the years 1930 and 1931, thereupon secured a cancellation of said lease and

abandoned said premises; that beginning in 1932, and through the years 1933 and 1934, the said defendants have continued to use the properties hereinabove described without paying plaintiff any rental therefor, and, if not restrained by this court, will occupy said premises during the fishing season of 1935; that preparations for the fishing of said premises for the season of 1935 have been made and said defendants, and each of them, have threatened and do now threaten to enter upon said Island and appropriate said premises for the uses of fishing and to the irreparable injury and damage of plaintiff. [7]

IX.

That the defendants, H. J. Barbey and Columbia River Packers Association and Baker's Bay Fish Company, operate four fish seines, each being over 1250 feet in length, over said premises belonging to plaintiff, and take from plaintiff's said premises immense quantities of salmon, and drag said seines upon the beaches; i. e., the land between high and low tides, of said Sand Island, for the purpose of taking fish; that in connection with the said seining operations of said defendants, the said defendants keep on said Sand Island twenty-six or more horses and stable said horses in buildings constructed by defendants on the mainland of said Island.

X.

That defendants have no right, title or interest in and to said premises, and should be restrained by

order of this court from fishing said premises and occupying said premises.

XI.

That plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, Plaintiff prays a decree of court as follows:

1. For an order of the Court, directing the defendant, Columbia River Packers Association, a corporation; Baker's Bay Fish Company, a corporation; and H. J. Barbey, to appear at a time fixed by this Court and show cause why the said defendants should not be enjoined and restrained from trespassing upon the said premises set forth in the complaint herein, and from seining said premises and the landing of fish thereon and using said premises for horses and men and carrying on said fishing and seining operations;

2. That upon hearing of this cause the Court decree that defendants herein, and each of them, have no right, title or interest in and to those certain premises lying in the Columbia River, south and west of Sand Island, or south and east of the main north ship channel [8] of the Columbia River, as shown by the government map for the year 1933, and that the plaintiff is the owner and entitled to the immediate and exclusive possession thereof, and that the court render a further decree restraining and enjoining the said defendants, and each of them, from using said premises in the manner aforesaid, or at all;

3. That plaintiff recover of and from defendants its costs and disbursements incurred herein.

CARL C. DONAUGH
United States Attorney for the
District of Oregon.
EDWIN D. HICKS
Assistant United States Attorney.

State of Oregon,
County of Multnomah—ss.

I, Edwin D. Hicks, being first duly sworn, depose and say: That I am duly appointed, qualified and acting Assistant United States Attorney for the District of Oregon; that I have read the foregoing Second Amended Complaint and know the contents thereof, and that the same is true according to my best knowledge and belief.

EDWIN D. HICKS.

Subscribed and sworn to before me this 8th day of June, 1935.

[Seal] HUGH L. BIGGS
Notary Public for Oregon. My commission expires: 9/17/35.

United States of America,
District of Oregon—ss.

Service of the within Second Amended Bill of Complaint is accepted in the State and District of Oregon this 8th day of June, 1935, by receiving a copy thereof, duly certified to as such by Edwin D.

Hicks, Assistant United States Attorney for the District of Oregon.

JAY BOWERMAN
Attorney for Columbia River Packers Assn., and Baker's Bay Fish Company.

CLARK & CLARK
Attorney for H. J. Barbey.

[Endorsed]: Filed June 10, 1935. [9]

AND AFTERWARDS, to wit, on Monday, the 10th day of June, 1935, the same being the 79th Judicial day of the Regular March Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [10]

[Title of Court and Cause.]

Now at this day upon motion of Mr. Edwin D. Hicks, Assistant United States Attorney,

IT IS ORDERED that he be and is hereby permitted to file a second amended complaint herein, and

IT IS ORDERED that the answer heretofore filed to the amended complaint stand as the answer to the second amended complaint herein. [11]

AND, to wit, on the 9th day of October, 1934, there was duly filed in said Court, an Answer to Amended Bill of Complaint, in words and figures as follows, to wit: [12]

[Title of Court and Cause.]

ANSWER TO AMENDED COMPLAINT.

Now comes the defendants and, for answer to the amended complaint of the plaintiff herein,

I.

Admit that, on the 21st day of October, 1864, the Legislative Assembly passed an Act entitled as in Paragraph I of the amended complaint alleged, and that ever since the passage of said Act the United States has been the owner of the rights and properties therein granted. In this connection the defendants aver that, in the main, Sand Island, referred to in said Act, is and always has been vacant and unoccupied and no use thereof made by the plaintiff, except that parts have from time to time been leased for use in connection with fishing operations.

II.

Admit that Sand Island is located in the lower waters of the Columbia river in Clatsop County, Oregon.

III.

Admit that a map attached to the original complaint (but not to the amended complaint) and marked Exhibit A, purports to show the location

of Sand Island. Deny that said map [13] properly, or at all, shows the location of the main, middle or north ship channel of the Columbia river, either as it existed when Oregon was admitted to the Union or as it exists at the present time. In this connection, the defendants allege that extending south and southeasterly from Cape Disappointment is a body of land commonly referred to as Peacock Spit; that said Peacock Spit extends to a point west and south of Sand Island, is not a part thereof but is now, and for many years last past was, a body of land having no connection with and constituting no part of Sand Island. In this connection, these defendants further allege that the boundaries of the State of Oregon were fixed by Act of Congress approved February 14, 1859 (11 St. L., ch. 33, p. 383; Vol. I, p. 32, Oregon Code 1930) which, so far as material here, reads as follows:

> "Beginning one marine league at sea, due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast lying west and opposite the state, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship-channel of the Columbia river; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla Walla."

At the time said Act was passed, the north ship-channel referred to therein was south and east of Cape Disappointment and west and north of Sand Island. In the case of State of Washington vs. State of Oregon, wherein it was determined that Sand Island was within Oregon and that the north ship-channel referred to in the Act admitting Oregon into the Union passed north of Sand Island, the physical conditions existing in the lower waters of the Columbia River at the time of the admission [14] of Oregon into the Union were discussed and there is made a part of the opinion of the court a chart or map of Sand Island, Baker's Bay, Cape Disappointment, Peacock Spit and the shoals and channels in the lower Columbia as shown by survey made by the United States Government and published in 1851 and there is also made a part of the said opinion another map or chart showing the changes in the contour and location of Sand Island at different times between 1851 and 1905. (211 U. S. 127, 53 L. Ed. 118; 214 U. S. 205, 53 L. Ed. 969). The northerly boundary of Oregon as fixed by said Act and in said decision of the supreme court of the United States is the southerly boundary of the State of Washington.

IV.

Admit that the waters of the Columbia river adjacent to some parts of Sand Island are shallow. This is particularly true of the waters to the north and east of Sand Island in the Baker's Bay area.

Prior to certain physical changes which have occurred during the past two or three years due to the construction of dikes by the government, the break in the south jetty and other causes, the south and west shore of Sand Island, as shown by the heavy white line marking the boundaries of said Island on the map attached to the original complaint herein, was adapted to drag seine fishing operations and valuable for that purpose. There never was any sand spit or sand beach constituting a part of Sand Island along the south and west shore thereof. The shore of Sand Island to the south and west was such as is ordinarily found upon firm land between high and low water mark in tidal waters.

V.

Defendants admit that defendant Columbia River Packers Association for many years last past was, and now is, a corpora- [15] tion organized under the laws of the State of Oregon and engaged, among other things, in the shing industry and that it owns and operates canneries; admit that Baker's Bay Fish Company is a corporation, that a majority of the capital stock is owned or controlled by Columbia River Packers Association. Deny that Baker's Bay Fish Company is the corporate agent of Columbia River Packers Association and aver that each of said corporations is a separate and distinct corporate entity and neither is the corporate agent of the other.

VI.

Admit that Baker's Bay Fish Company for many years last past was, and now is, a corporation organized under the laws of the State of Washington and engaged, among other things, in the fishing industry in the waters of the Columbia river and elsewhere.

VII.

Admit that, on March 27th, 1930 (not May 1st as alleged in the amended complaint) the Secretary of War, acting for and on behalf of the United States of America, leased to the defendants H. J. Barbey and Columbia River Packers Association, for a period of five years from and after May 1st, 1930, but subject to revocation at any time at the will of the Secretary of War, the right to use certain parts of the southerly and southwesterly shore line of Sand Island for seining purposes only, the premises being known as Sites Nos. 1, 2, 3, 4 and 5.

Admit that said lease and said Sites are referred to in the decision of the Supreme Court of the State of Oregon in the case of Strandholm vs. Barbey, 145 Ore. 427, 26 Pac. (2d) 46 (inaccurately cited in the amended complaint as 144 Or. 705, 26 Pac. (2d) 48).

VIII.

Admit that under said lease defendants Columbia River [16] Packers Association and H. J. Barbey used the leased premises in connection with drag seine fishing operations during a part of the fishing season of 1930 and a part of the fishing season

of 1931. Due to physical changes, fishing on the leased premises became impracticable in 1931 and the said defendants, being no longer able to fish said leased premises because of such physical changes and being substantially evicted therefrom by reason thereof, quit and abandoned said premises in August, 1931, and at no time thereafter used or occupied the same or any part thereof for fishing purposes or for any other purpose. Thereafter, and in May, 1932, the Secretary of War, acting in behalf of the United States of America, formally cancelled and terminated said lease.

Deny each and every other allegation contained in paragraph VIII of the amended complaint. In this connection, the defendants allege that what the plaintiff in truth and in fact complains of in the amended complaint and what it in terms alleged and complained of in the original complaint herein was that the defendants under what purported to be a lease of a part of Peacock Spit from the State of Washington, and which was a lease lawfully entered into, the defendants were fishing said part of Peacock Spit described in the lease from the State of Washington, the plaintiff asserting in said original complaint what in truth and in fact it seeks to assert in the amended complaint that that portion of Peacock Spit leased to the defendants as aforesaid by the State of Washington is in fact within the State of Oregon. The situs of fishing operations of which the plaintiff complains is not on Sand Island but on Peacock Spit.

In this connection, these defendants allege that for upwards of seventy (70) years there has been a body of land, commonly referred to as Peacock Spit, extending, in early years, [17] southwesterly and, in later years, southeasterly from Cape Disappointment into the waters of the Columbia River. No part of Peacock Spit was at any time, or is now, within the boundary of the State of Oregon as fixed by the Act of Congress admitting it into the Union and as determined by the decision in the case of State of Washington vs. State of Oregon, supra. Peacock Spit and every part thereof has been within the State of Washington ever since said State was admitted into the Union.

In May, 1928, the defendant Baker's Bay Fish Company leased from the State of Washington, for fishing purposes, certain parts of Peacock Spit being the identical area embraced within the lease which said defendant now has with the State of Washington. On or about June 4, 1931, said lease was cancelled by the State of Washington and said premises reappraised and a lease thereon was offered at public auction to the highest bidder and said premises were again leased to defendant Baker's Bay Fish Company by the State of Washington for a period ending in December, 1932. Thereafter, and on December 22, 1932, the said premises were again leased to defendant Baker's Bay Fish Company by the State of Washington. That attached hereto, marked Exhibit A and made a part of this answer is a true copy of the lease last referred to bearing

date December 22nd, 1932. That said lease is still in full force and effect. On December 28, 1932, defendant Baker's Bay Fish Company assigned and transferred unto the defendant H. J. Barbey a half interest in said lease, which transfer was consented and approved by the State of Washington on January 5th, 1933. Said lease is the identical lease referred to in paragraph IX of the original complaint herein wherein it was alleged that the defendants

> "fraudulently entered into a pretended lease with the State of Washington, through its said Commissioner of Public Lands, for certain lands which were described as 'Peacock Spit',".

[18]

That said premises so leased from the State of Washington are the premises upon which the defendants have been carrying on the fishing operations referred to in the original complaint and in the amended complaint and said fishing operations have been confined entirely to the premises described in said lease. The premises upon which the defendants keep horses and maintain structures, referred to in paragraph XI of the original complaint and paragraph IX of the amended complaint, are the premises described in said lease with the State of Washington.

Pursuant to the laws of the State of Washington and before either of said leases was executed by the State of Washington to the defendant Baker's Bay Fish Company, public notice was given that such lease would be executed to the highest bidder

for the fishing privileges therein to be granted, and an additional special notice in writing sent by the Commissioner of Public Lands of the State of Washington to all persons and concerns engaged in the fishing industry as packers, canners or operators of seining grounds. The subject-matter of each of said leases was sold at public auction to the highest bidder. Defendant Baker's Bay Fish Company was the highest bidder, bidding the sum of $36,000.00 a year for fishing rights covered by the lease executed in May, 1928; $7,500.00 a year for the lease executed in June, 1931; and $5,000.00 a year for the lease executed in December, 1932; the decrease in the rentals being due in part to physical changes in the structure of Peacock Spit, lessening its value for fishing purposes, the economic depression, and the unsatisfactory condition of the fishing industry. It was during this same period that the plaintiff in this suit was leasing to defendants Columbia River Packers Association and H. J. Barbey certain fishing rights on Sand Island for a consideration of about $37,000.00 a year and without any claim or pretense that the aforesaid leases for the State of Washington were upon Sand Island or in [19] anywise conflicted with the leases executed by the United States for fishing rights on Sand Island.

The premises leased by the State of Washington to defendant Baker's Bay Fish Company as aforesaid, being the identical premises upon which the defendants have carried on the fishing operations described in the original complaint and in the

amended complaint herein, are not and never were a part of Sand Island and are not and never were within the State of Oregon.

At no time since Oregon was admitted to the Union has it claimed that said premises or any part thereof were within the State of Oregon or exercised or claimed the right to exercise any jurisdiction over it.

At all times since the State of Washington was admitted into the Union, it has claimed and still claims that the premises in question and all other parts of Peacock Spit were and are within the said State and the right to exercise jurisdiction over them. Ever since the State of Washington was admitted into the Union it has exercised control and jurisdiction over said premises and all other parts of Peacock Spit for fishing purposes and other purposes and has from time to time issued licenses for fish traps and other stationary fishing appliances and gear to be maintained on said premises and has leased said premises for drag seine fishing.

Since the State of Washington was admitted to the Union many controversies have arisen with regard to fishing rights on Peacock Spit and in waters adjacent thereto, including the premises described in the lease, a copy of which is attached to this answer, being the identical premises to which the plaintiff refers in its original complaint and in its amended complaint herein. In all such controversies the courts of the State of Washington have assumed jurisdiction and adjudicated such [20] controver-

sies upon the undisputed assumption that the premises were located within the State of Washington. The case of Williams Fishing Company vs. Savidge, as Commissioner of Public Lands of the State of Washington, 152 Wn. 165, 277 Pac. 459, was a suit brought to restrain the Commissioner of Public Lands of the State of Washington from executing to Baker's Bay Fish Company, one of the defendants in this suit, the first lease executed by the State of Washington to said defendant, which lease was executed in May, 1928, and covered the identical premises, including Peacock Spit, described in the lease executed in December 22, 1932, a copy of which is attached to this answer as Exhibit A, being the identical premises upon which the defendants carried on the fishing operations described in the complaint and in the amended complaint herein and which lease additionally described lot 3, in the same section, township and range. The Supreme Court of the State of Washington assumed jurisdiction in said case, held that the Commissioner of Public Lands had authority to execute said lease and that the lease was valid. Various phases of the same controversy came before the Supreme Court of Washington in two subsequent cases in which the validity of the lease was sustained (155 Wn. 443, 284 Pac. 744; 164 Wn. 50, 2 Pac. (2d) 722).

Long prior to 1925, the United States of America solicited and obtained a legislative grant from the State of Washington for use for military purposes, when such use became convenient or necessary, of

Peacock Spit, and all other tide lands lying within one and one and one-half miles of the south point of Cape Disappointment. In March, 1925, the Attorney General of the United States rendered an opinion to the effect that Peacock Spit was not a part of a military reservation; that the use thereof had been granted by the State of Washington to the United States for military purposes so long as the adjoining shore lands were so used; that Peacock Spit was in the State of[21]Washington and that the State of Washington might legally permit fishing upon it and in the waters adjacent thereto (Op. Attorney General Vol. 34, pp. 435 and 436). The following is quoted from said opinion of the Attorney General (Vol. 2 Fed. Supp. p. 432):

> " 'First. Peacock Spit and all other tide lands lying within one and one-half miles of the southern point of Cape Disappointment were not reserved by the order of 1852, and do not belong to the United States, although the use of such lands has been granted by the State of Washington to the United States for military purposes, so long as the adjoining shore lands are so used.
>
> " 'Second. The State of Washington may legally permit fishing upon and in the vicinity of such tide lands.' "

The premises in controversy in this suit are a part of the premises referred to in said opinion of the Attorney General. The United States of America

has repeatedly asserted in judicial proceedings and otherwise that the premises here in controversy were located within the State of Washington. In 1930, in the District Court of the United States for the Western District of Washington, Southern Division, the United States of America, as Trustee and guardian of certain Indian tribes, brought two suits, one against defendant Baker's Bay Fish Company and others upon claim that said defendant under lease of the premises in controversy in this suit from the State of Washington was interfering with and impairing the treaty fishing rights of the Indians. (U. S., as Trustee, etc. vs. McGowan; U. S. vs. Bakers Bay Fish Company, et al; 2 Fed. Supp. 426). In each of said suits it was alleged that the premises in question were located in the State of Washington, and in the suit against Baker's Bay Fish Company, et al, it was alleged that each year from time immemorial certain Indians were accustomed to fish the waters and locations along the north shore of the Columbia River, [22]

> "and among others were certain locations situated on the north bank of the Columbia River, in Pacific County, Washington, and on Peacock Spit, in Pacific County, Washington, opposite to and adjoining the Fort Canby Military Reservation, and being in Township Nine (9), North of Range Eleven (11), West of Willamette Meridian."

It was further alleged in said complaint by the United States of America that the Indians had and

claimed to have the right to fish in certain particular locations described as follows:

> " 'Those certain tidelands situated in front of, adjacent to, or abutting upon Lots three (3) and four (4), Section nine (9), Township nine (9) north, of Range Eleven (11), West of the Willamette Meridian, including Peacock Spit, as shown upon the map of the mouth of the Columbia River prepared by the United States Engineer's Office, Second Portland, Oregon, District of May, 1928.' "

Lot Four (4) above described is the identical parcel of land described in the lease of the State of Washington to defendant Baker's Bay Fish Company, a copy of which is attached to this answer, and is the identical premises described in the prior leases which said defendant had from the State of Washington. In said suits the State of Washington intervened and Judge Cushman assumed jurisdiction on the assumption that the premises were in the State of Washington and held that the Indians had not established any treaty rights as against the State of Washington or its lessee, Baker's Bay Fish Company. The decision of Judge Cushman was affirmed by the Circuit Court of Appeals (62 Fed. (2d) 955), and by the Supreme Court of the United States (Adv. Sh. No. 1. p. 87, Vol. 78 L. Ed. Oct. 23, 1933).

In this connection the defendants further allege that the shallow channel cutting across Peacock Spit in a southwesterly and northeasterly direction

southerly of Cape Disappointment is not and never was a natural channel. It was caused in this manner: four or five years ago the "North Bend", a large sailing vessel, went [23] ashore on Peacock Spit at about where the southwesterly terminus of said channel is now located. It did not break up but, through the action of the winds, waves and tides, was slowly driven, during a period of a year or more, across Peacock Spit into the channel then existing between it and Sand Island and through the channel so cut water has continued to run with the ebb and flow of the tides since that time.

These defendants in this connection further allege that this suit involves a determination of the boundary line between the State of Oregon and the State of Washington; that said States are indispensable parties to this suit and this court has no jurisdiction over this suit.

That this suit involves the determination of the title to land which the State of Washington claims to own and the right to lease and the State of Washington is an indispensable party. That the lands and premises involved in this suit are not located within the State of Oregon but are located within the State of Washington, and are beyond the jurisdiction of this court.

IX.

The defendants admit that they operate drag seines about 1250 feet in length, over and upon the premises leased from the State of Washington, pursuant to the lease, a copy of which is attached to

this answer as Exhibit A, and during the fishing season of 1934 took considerable quantities of salmon from the waters adjacent to said leased premises through the use of said drag seines. Defendants also admit that they have built and maintained structures and keep some horses on the said leased premises.

Deny that the said premises belong to the plaintiff or that they are within the State of Oregon or that the defendants or either of them carry on any fishing operations on any property [24] belonging to the plaintiff or maintain any structures or keep any horses upon properties belonging to the plaintiff.

X.

Deny the allegations contained in paragraph X of the amended complaint.

XI.

Deny the allegations contained in paragraph XI of the amended complaint.

WHEREFORE defendants pray that this suit be dismissed; that they may recover their costs and disbursements, and have such further relief as may be just in the premises.

A. E. CLARK,
M. H. CLARK,
JAY BOWERMAN,
GUY KELLY,
Attorneys for Defendants. [25]

State of Oregon,
County of Clatsop.—ss.

I, H. J. Barbey, being first duly sworn, depose and say that I am one of the defendants in the above entitled cause; and that the foregoing answer is true as I verily believe.

H. J. BARBEY

Subscribed and sworn to before me this 8th day of October, 1934.

[Seal] W. T. EAKIN
Notary Public for Oregon.

My commission expires Jany. 11, 1936. [26]

EXHIBIT "A"

THIS LEASE, made and entered into this 22nd day of December, A. D. 1932, by and between the State of Washington, party of the first part, and Bakers Bay Fish Company, Ilwaco, Washington, party of the second part,

WITNESSETH that for and in consideration of the sum of Five thousand and no/100 ($5,000.00) Dollars per year, to be paid to the Commissioner of Public Lands of the State of Washington yearly in advance, and in consideration of the covenants hereinafter contained, the State of Washington doth lease, demise and let unto the party of the second part that tract or parcel of tide land of the second class, situate in Pacific County, State of Washington, and described as follows, to wit:

That portion of the tide lands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon the southerly side of lot 4, section 9, township 9

north, range 11 west, W.M., including Peacock Spit, lying southeasterly of the Main Channel Range, as shown upon the United States Coast and Geodetic Survey Chart No. 6151 of the Columbia River.

This lease is issued under the provisions of section 126 of chapter 255 of the Session Laws of 1927, and is subject to the grant of the above described tract to the United States, under the provisions of section 150 of said chapter 255, for the period of five (5) years from the date of this instrument.

As a further consideration the following covenants are mutualy agreed to:

The payment of the above mentioned annual rent to the Commissioner of Public Lands of the State of Washington yearly in advance is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and if said annual rent shall not be paid on or before the date when due, this lease shall be null and void.

The State of Washington reserves the right to approve any assignment of the whole or any interest in and to the within leasehold.

The tide lands herein shall not be offered for sale except upon application of lessee, who shall have preference right to release at highest rate bid; provided, however, and these rights are conditioned that lessee shall keep his lease in good standing.

All improvements placed upon said land by the lessee, capable of removal without damage to the land, where the lease is yielded to the state prior

to any application to purchase said land, may be removed by the lessee, or at his option may remain on the land subject to purchase or hire, and this lease is granted according to the provision of an act relating to lease, etc., of state lands, approved March 16, 1897 (as amended by section 2 of an act approved March 13, 1899, and acts amendatory thereof and supplemental thereto.) [27]

All piling or other improvements placed upon the above described tide lands shall attach to and become a part of the realty unless moved or sold under the provision of the said act relating to lease, etc. of state lands, approved March 16, 1897, and acts amendatory thereof and supplemental thereto within three years after termination by surrender or limitation of lease or re-lease.

No statutory right vested in lessee is waived hereby, and lessee expressly agrees to all covenants herein and binds himself or themselves for the payment of rent as hereinbefore set out.

THE STATE OF WASHINGTON
C. V. SAVIDGE,
Commisisoner of Public Lands
By: W. M. DUNCAN,
Assistant Commissioner of Public Lands
BAKERS BAY FISH COMPANY
By W. L. THOMPSON,
Pres.
Lessee
P. O. Address c/o Barbey Packing Co.
P. O. Box 449 Astoria,
State of Oregon.

Witnesses as to Lessee
A. H. Whittle
Geo. Perkin

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within ANSWER TO AMENDED COMPLAINT is hereby accepted in Multnomah County, Oregon, this 9th day of October, 1934, by receiving a copy thereof, duly certified to as such by M. H. Clark, of attorneys for defendants.

EDWIN D. HICKS,
of Attorneys for Plaintiff.

[Endorsed]: Filed October 9, 1934. [28]

AND AFTERWARDS, to wit, on the 8th day of July, 1935, there was duly filed in said Court, an OPINION OF THE COURT in words and figures as follows, to wit: [29]

[Title of Court and Cause.]

OPINION

Carl C. Donaugh, United States District Attorney
Edwin D. Hicks, Assistant United States District Attorney
Portland, Oregon,
Attorneys for Plaintiff.

Clark & Clark, Portland, Oregon
Jay Bowerman, Portland, Oregon
Attorneys for the Defendants.

CAVANAH, District Judge.

The suit is in equity brought by the United States claiming ownership and exclusive possession of the

premises lying in the Columbia River south and west of Sand Island and south and east of the main North Ship-Channel of the River and that the defendants be enjoined from using the same in carrying on fishing and seining operations.

The principal issue raised by the pleadings and presented by the evidence is whether the lands in dispute are accretions to Sand Island and located in the State of Oregon, and if so do they belong to the United States, and if not so located, are they a part of Peacock Spit situated in the State of Washington extending southeast from Cape Disappointment into the waters of the River and beyond the jurisdiction of this Court and are held under a lease from the State of Washington by the defendants Baker's Bay Fish Company and H. J. Barbey?

It first becomes necessary to locate the boundary line between the two states which was fixed by an Act of [30] Congress on February 14, 1859, fixing the boundary of the State of Oregon, 11 Stat. L. Ch. 33, page 385, and at the time the Act was passed the North Ship-Channel was south and east of Cape Disappointment and west and north of Sand Island. It was definitely located by the Supreme Court in an action brought by the State of Washington against the State of Oregon. Washington vs. Oregon, 211 U. S. 127, rehearing 214 U. S. 205, and it was there determined that Sand Island was within the state of Oregon and that the center of the North Ship-Channel refered to in the Act Admitting Oregon into the Union passed north of Sand Island and

was changed only as may be from time to time through the process of accretions. The physical conditions existing in the lower waters of the Columbia River at the time of the admission of the state of Oregon were discussed in the opinion of the Court and as a part of it a map or chart, the same now before us, appears showing the location of Sand Island, Cape Disappointment, Peacock Spit, Baker's Bay and the channel and shoals of the River in 1851 and the changes in the contour and location of Sand Island at different times between 1851 and 1905. The northerly boundary line of the state of Oregon as fixed by the decision is the southerly boundary line of the state of Washington.

When we come to locate the boundary line between the two states fixed by the Supreme Court as being the center of the north ship-channel which was south and east of Cape Disappointment and west and north of Sand Island, our problem is in locating the channel south and east of Cape Disappointment and west of Sand Island as a solution of that issue of fact becomes necessary in determining the boundary line between the two states in the area where the disputed premises are located. The channel west of Sand Island lies between it and [31] Peacock Spit, and the sands abutting Sand Island and Peacock Spit have at times shifted. It appears that during the Civil War, President Lincoln withdrew from entry Sand Island for Military purposes and at the request of the then Commander of the Columbia River District the legislative assembly of

the State of Oregon on October 21, 1864, by an Act ceded to the United States, Sand Island and whatever rights the State had to the lands, between high and low water, abutting on the Island, and which was an unqualified grant of the fee. Sp. Laws Ore. 1864, p. 72. Columbia River Packers Association et al., vs. United States et al., 29 Fed. (2nd) 91. Ever since then the United States has asserted title and right to the Island and the abutting sands and has from 1880 to and including 1932 leased the fishing sites situated along the southerly and westerly shores of the Island for the purposes of drag seining operations receiving therefor large sums as rentals, some of which from the defendants, without being challenged. The channel as located by the Supreme Court, which we must adopt has shifted some from time to time from the east to the west which was caused by the shifting of sands when there were abnormal tides, but the channel, northerly, westerly and southerly of the Island still remains. The difficult problem to be solved is whether the accretions have been from Sand Island to Peacock Spit and whether the growth has been from the east to the west or from the west to the east, covering the fishing sites in controversy. They must be between high and low water and south and west of and accretions to San Island and owned by the United States before it should prevail. The evidence is conflicting in that respect when we come to consider the physical conditions and the changes in

the contour and location of Sand Island and Peacock Spit and the shifting of the channel and the sands. A number of maps prepared by the [32] Government over a series of years commencing with the year 1839, and by others are in evidence and have been explained by engineers and others as to the changes having taken place from year to year and from it all we find a conflict in their versions and observations as to whether the disputed fishing sites are accretions to Sand Island or Peacock Spit. There has been a gradual shifting and growing of both the Island and Peacock Spit caused by frequent storms, high water tides and breakers which have at times broken up the shores of the Island and the sands lying in that vicinity. The tides, waves and currents have direct access from the bar at the mouth of the River to the Island. They move the sands of the Island and Peacock Spit around and wash them in and out. During high water tides, sands lying south of Cape Disappointment and west of the channel between Cape Disappointment and the Island and the sands south of the Island and east of the channel separating the Island and Cape Disappointment have been covered with water. The earliest date that Peacock Spit appears is in 1880, which is a body of land and sands extending south and southeast from Cape Disappointment. During the winter of 1928 and 1929 the sands of Peacock Spit were to some extent, by reason of a storm and high tides, torn apart and dissipated.

As to Sand Island, it has been in existence for a long time, and the sands abutting thereon have shifted some westerly and increased in area which was due to accretions. Adjoining it on the north are the waters of Baker's Bay and to the south is the main channel of the river. The Island itself is admitted to be within the State of Oregon but not the disputed fishing sites which defendants contend are accretions of Peacock Spit and are therefore covered by and used by them under their lease from the State of Washington. This is the crucial issue of fact in this case, and calls for a conclusion [33] as to whether the accretions, where the disputed fishing sites are located have been from Sand Island or from Peacock Spit for the increase in area gives to the owner of the land on which accretions abuts all the accretions thereto, and the title to the accretions extend to the point where the two bodies of land may unite.

The defendants J. H. Barbey and the Columbia River Packing Association, on March 27, 1930, executed a lease with the Secretary of War for five years commencing May 1, 1930 which was subject to revocation at will by the Secretary, of the lands on the south side of Sand Island in Oregon, described as "all of that certain premises of the south shore of Sand Island, together with rights, easements and appurtenances thereunto belonging, known as sites nos. 1, 2, 3, 4 and 5, the northernmost boundary being marked by line running due west from U. S. Monument no. 4 to the intersection with

low water line; the easterly boundary is marked by line running due south through Station "Island" to low water near the east end of Sand Island, length of shore line approximately 18,000 feet, all as shown and described on the attached map which is made a part hereof", and the map attached to the lease located the sites as being on the south shore of Sand Island, and at a rental of $37,175.00 annually, and after occupying the sites under the lease for 1930 and 1931 they secured a cancellation of it and abandoned the premises beginning with 1932. Thereafter during the years of 1933 and 1934 they again used the premises described in the lease without paying the United States any rental therefor. On May 7, 1928, the defendant Baker's Bay Fish Company executed a lease with the State of Washington for an annual rental of $36,000.00 and for a period of five years to "that portion of the tide lands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon the southerly side of lot 4, Section 9, [34] township 9 north range 11 west, W. M., including Peacock Spit, lying southeasterly of the Main Channel Range, as shown upon the United States Coast and Geodetic Survey Chart No. 6151 of the Columbia River". The last mentioned lease was renewed on December 22, 1932, covering the same lands for an annual rental of $5000.00 for a period of five years, and under it the defendants assert a right to occupy the sites for seining operations. After the defendants' answer was filed the

state of Washington enacted a law prohibiting the use of drag seines in that state which seemed to have caused the defendants to appear before the State Land Board of the state of Oregon and urge the Board to lease the premises. From their actions they seemed to be somewhat in doubt as to just where these disputed sites are located for they were content in accepting, first, a lease from the United States stating that they were in the state of Oregon and owned by the United States, second, that in their lease with the state of Washington the sites were located in that state and third, that they are now interested in the action of the State Land Board of Oregon in leasing them as being in the state of Oregon. But however inconsistent the position of the defendants may be in that respect, the conclusion is reached under the evidence that the disputed fishing sites as described in the complaint are accretions to Sand Island and they and the adjacent tide and shore lands up to high water line are located within the state of Oregon and are owned by the United States under the unqualified grant from the state of Oregon, after further considering the north ship-channel as an active one and has maintained approximately the same general course since 1880. The movement peculiar to Sand Island and sand bodies which are predisposed to form in the estuary of the Columbia are recognized in the decision of the Supreme Court and the rules for location of the line of the channel [35] were prescribed by the Court; (1) the line may be lo-

cated by tracing the thread of the channel as the same may have from year to year varied through process of accretion and (2) as the same has varied by reason of changes shaped through the construction of jetties out into the river. This is significant when we consider the language used by the Court: "So whatever changes have come in the north channel and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion, or, perhaps, also of late years from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel. Washington vs. Oregon, on rehearing, 214 U. S. 205-215. So the variation in the line of the channel may be accounted for by accretions or shaped through the construction of jetties out into the river and when so done we must follow the line as so changed by accretions or shaped through the construction of the jetties. The evidence would not justify the conclusion that the change in the channel's course during the years it occurred was avulsion or from the fact that the sands of Peacock Spit, in the winter of 1928 and 1929 were torn apart and set afloat in the estuary of the Columbia River, or under the assumed legal status of tide lands or tide flats, nor would that fact and because some of them united later on with the sands of Sand Island, take away from Sand Island and sands which are accretions of it

in the area where the disputed fishing sites are located. Therefore, this Court has jurisdiction to determine the subject matter of the controversy as between the present parties, the defendants being resident citizens of Oregon.

In the case of Columbia River Packers Association Inc., et al. vs. United States et al., supra, where the United [36] States and its lessee brought suit against the State Land Board of the state of Oregon and its lessee, to establish the right and title of the United States to Sand Island, and to the tide and shore lands adjacent thereto, the Ninth Circuit Court of Appeals after reviewing the history of the Island stated that the Island was within the limits of the state of Oregon and that by the Order of the President it was set apart for military purposes on April 21, 1863, and on October 24, 1864 the state of Oregon by an Act granted to the United States "all the right and interest of the state of Oregon in and to the land in front of Ft. Stevens and Point Adams, situate in this state, and subject to overflow between high and low tide; also to Sand Island, situate at the mouth of Columbia River in this state; the said Island being subject to over-flow between high and low tide", and that although the Island was never used for military purposes yet Congress passed an Act on July 28, 1892 authorizing the Secretary of War to lease the premises for a period of five years and that pursuant to such authority the Secretary had leased the Island and the adjacent tide and shore

land for fishing purposes since 1903 and from such leasing there had been paid to the United States upwards of $400,000.00 as rentals. The court said "After the lapse of nearly 70 years it would seem that a grant such as was made by the state of Oregon in this case should not be open to further controversy, especially in view of the fact that the grantee has asserted and exercised dominion over the granted premises for upwards of 25 years. Nevertheless, the state of Oregon now contends, first, that the grant was for military or naval purposes only, and, second, that the grant has never been accepted by Congress. But the grant itself is absolute in form, without limitation or condition, and it would violate every known rule of statutory construction to ingraft upon it now any such limitation [37] or condition as that contended for by the appellees, especially in view of the construction the parties themselves have placed upon the grant for so long a period. Furthermore long acquiescence by the state in the assertion of title and the exercise of dominion over the property by the United States should be deemed conclusive at this late day. Indiana vs. Kentucky, 136 U. S. 479, 10 S. Ct. 1051, 34 L. Ed. 329."

While the laws of Oregon provide that tide lands over which the tide ebbs and flows from the line of the high tide to the low tide belong to the state, section 60-301 Oregon Code 1930, yet we observe that the Court of Appeals interprets the grant from the state of Oregon to the United States as con-

veying all of the interest of the state in and to the lands between high and low tide and that by virtue of the absolute grant from Oregon, which was without limitation or condition, the United States acquired title and right to the lands between high and low water mark of the River and by reason of that decision holds the full riparian rights with respect to the southerly and westerly shores of the river.

Attention has been called by the defendants to the case of United States vs. McGowan et al., 2 Fed. Supp. 426, which was affirmed by the Circuit Court of Appeals, 62 Fed. (2nd) 955, relating solely to Peacock Spit located in the State of Washington as it then existed in 1928, and succeeding years. The suit was brought by the United States as Guardian of certain Indians alleging that their fishing rights under a treaty had been interfered with by the defendants who claimed to have leased from the state of Washington, Peacock Spit, and which was at the time of leasing the sole and exclusive property of the state of Washington. Neither the opinion or the evidence recited in it relate, in any way, or effect the area in which the fishing sites are, involved in the present case, and there- [38] fore it does not determine the ownership or location of the disputed fishing sites we are now dealing with.

The further question of jurisdiction is urged by the defendants that as the states of Oregon and Washington claim an interest in the premises they are necessary parties to the present suit and being

so that would divest the Court of jurisdiction. On the eve of the trial these two states requested permission to intervene under equity rule 37, which was denied. Had the Court permitted these states to intervene it would have been "in subordination to and in recognition of the propriety of the main proceedings", which intervenors must accept. Equity Rule 37. Adler vs. Seaman et al., 266 Fed. 828; Jennings vs. Smith et al., 242 Fed. 561-564; and would not have divested the Court of jurisdiction, In re Veach, 4 Fed. (2nd) 334, as the intervenor could not challenge the jurisdiction of the Court; Wichita Railroad & Light Company vs. Public Utilities Commission of the State of Kansas et al., 260 U. S. 48-54; King vs. Barr, 262 Fed. 56-59; Adler vs. Seaman, supra; Mueller et al. vs. Adler et al., 292 Fed. 138. The presence of the two states is not essential to a decision of the controversy between plaintiffs and defendants for the merits of the cause can be determined without directly affecting the rights of the states or be binding upon them, Hurley vs. Pusey & Jones Co., 274 Fed. 487-488, and the Court will not lose jurisdiction under such circumstances, Wichita Railroad & Light Company vs. Public Utilities Commission of the State of Kansas, supra. The same question was commented upon by the Court in the case of United States vs. McGowan, supra, where the statute granting exclusive jurisdiction of all controversies of a civil nature where a state is a party was referred to, and the Court there held that in a case between the United States

and individual and corporate citizens did not come within the exceptions. No affirmative relief was asked for in the case [39] by the United States against the state of Washington, nor is any asked for here against either the State of Oregon or Washington. The Court said "This Court may consider the rights and powers of the state in determining issues asserted by the United States against the individual and corporate defendants, claiming rights acquired from the state, although it may not undertake to determine and enforce such rights against the state itself or its officers." The case was appealed to the Circuit Court of Appeals and while the question of jurisdiction was not discussed in the opinion yet both the trial and appellate Courts assumed jurisdiction, United States vs. McGowan, supra. If these two states claim ownership of the premises adverse to one another they can bring a proper action in the Supreme Court who would have original jurisdiction under the constitution and Federal Statute; Article 3 Section 2 Constitution, Section 341, Title 28, U. S. C. A. as we find that the Supreme Court has exclusive jurisdiction of all controversies of a civil nature where the state is a party, Minnesota vs. Hitchcock, 185 U. S. 373. Of course, the determination of the question here involved by the Court as between the present parties would in no way affect or be binding upon the rights of these two states as they are not parties to the present action. After considering these principles applicable to the application to intervene and

the contention of the defendants under the circumstances disclosed by the record, the Court is of the opinion that it did not abuse its discretion in denying intervention which the Courts hold it has in denying intervention or requiring the bringing in of the states, Acme White Lead & Color Works vs. Republic Motor Truck Co., Inc., 284 Fed. 580; Equitable Trust Co., of New York vs. Connecticut Brass & Mfg. Corporation et al., 290 Fed. 712.

In view of the reasons thus expressed and the conclusion reached, the relief prayed for by the plaintiff is [40] granted and the defendants are perpetually enjoined from further occupying or using for seining operations, the disputed fishing sites described in the complaint, and with plaintiff's costs. Findings and decree may be prepared in accordance with the conclusions reached.

[Endorsed]: Filed July 8, 1935. [41]

AND AFTERWARDS, to wit, on the 9th day of August, 1935, there was duly filed and entered upon the record in said Court, FINDINGS OF FACT AND CONCLUSIONS OF LAW, in words and figures as follows, to wit: [42]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled cause came on regularly for trial in the above-entitled Court, Honorable Charles

C. Cavanah, Judge of said Court, presiding, on the 11th day of June, 1935, the plaintiff, United States of America, appearing and being represented by Edwin D. Hicks, Assistant United States Attorney for the District of Oregon, and defendants, Columbia River Packers Association, a corporation; Baker's Bay Fish Company, a corporation, and H. J. Barbey, appearing and being represented by A. E. Clark and Jay Bowerman, whereupon evidence, both oral and documentary, on behalf of the several parties was offered and received, the Court, having duly considered the evidence and arguments of counsel and being fully advised in the premises, now finds the following:

FINDING OF FACT NO. 1

That on the 21st day of October, 1864, the Legislative Assembly of the State of Oregon passed an Act entitled:

> "An Act to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned:"

That Section 1 of said Act provided as follows:

> "Section 1. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow, between high and low tides, and also to Sand Island, situate at the mouth of the Columbia [43] River in this state; the said island being subject to overflow between high and low tide."

That the said Sand Island has been for many years last past, and now is, located in the estuary of the Columbia River, near the mouth of said River, within the United States of America and within Clatsop County, State of Oregon, and within the jurisdiction of this Court. For a more complete and detailed description of said Island and its appurtenances reference is made to the map and chart hereto attached, marked Exhibit "A" and made a part hereof, and which shows the approximate location, with the sands abutting from the southerly shores thereof.

For many years last past, save for the occupation of said premises under leases and licenses executed by plaintiff from time to time and save for the encroachment of the defendants as to the years 1933 and 1934 as hereinafter recited, plaintiff has held exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.

FINDING OF FACT NO. 2

The North Ship Channel of the Columbia River is an existent channel which takes a course westerly and northerly of Sand Island through Baker Bay and proceeds thence southerly into the main or South Channel of the Columbia River between the eastern shore of Cape Disappointment within the State of Washington and the westerly shore of Sand Island, and the said channel as so constituted marks

the boundary line between the States of Oregon and Washington.

FINDING OF FACT NO. 3

That there is abutting from Sand Island a body of sands which forms the southerly and extreme southwesterly shore line of said Island and the same is subject to overflow between high and low tide. The [44] sands here referred to are more particularly described by reference to the map and chart hereto attached, marked Exhibit "A" and made a part hereof, and with particular reference to the area circumscribed and colored in yellow on said map and chart. These sands have formed as accretions and additions to Sand Island through the normal processes of the waves, winds, tides and currents of the Columbia River, which said waves, winds, tides and currents have caused particles of sand and a certain sand bar and/or bars, situate during years previous to the south and west of Sand Island, to be broken up and shifted, to become attached to said Sand Island by a slow and imperceptible process; the said sands so formed constitute an accretion and an addition to Sand Island and form a part thereof.

The southerly and extreme southwesterly shoreline of said Sand Island abuts upon and faces, without obstruction, the main body of the Columbia River and embraces certain fishing sites and locations situate westerly of the most westerly dike on said Sand Island, and this said area is the same

as that last above-mentioned and which is circumscribed and defined in yellow on the map and chart marked Exhibit "A" and made a part hereof.

FINDING OF FACT NO. 4

That the waters of the Columbia River adjacent to Sand Island are frequented by salmon, and the sands abutting from the mainland of said Sand Island along the southerly and extreme southwesterly shore are peculiarly adapted for use in the drawing of seines and floating fishing gear, and the said sands have had at all times herein mentioned, and do now have, great value as sites and locations for the carrying on of fishing operations.

FINDING OF FACT NO. 5

That the Columbia River Packers Association, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing [45] under and by virtue of the laws of the State of Oregon, and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

That the Baker's Bay Fish Company, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

FINDING OF FACT No. 6

That on the 27th day of March, 1930, the defendants, H. J. Barbey and the Columbia River Packers Association, defendants herein, leased from plaintiff, for seining and fishing purposes only, for a period of five years, certain fishing sites and locations styled as Sites Numbered, 1, 2, 3, 4, and 5, which said sites embrace a continuous area along the southerly and extreme southwesterly shore of Sand Island; that said defendants and each of them, including the Baker's Bay Fish Company, after having occupied said Sand Island under the terms of the lease last above referred to for two successive seasons, to-wit: for the years 1930 and 1931, thereupon secured a cancellation thereof as of the 10th day of May, 1932; that thereafter, and during the fishing seasons of 1933 and 1934, the said defendants continued to use that portion of the said fishing sites and locations which extends westerly from the most westerly dike situate on the south shore of Sand Island, described as to approximate location by reference to the map and chart hereto attached marked Exhibit "A" and made a part hereof, and by further particular reference to that portion of said map and chart embraced and circumscribed in yellow thereon; that the said properties and sites were so used for the carrying on of fishing operations during the years 1933 and 1934, as aforesaid, without authority or lease or license of and from the plaintiff and in defiance of plaintiff's right [46] to absolute and exclusive possession of said premises.

FINDING OF FACT No. 7

That the defendants have threatened, and are now threatening, to enter upon the fishing sites and locations upon Sand Island embracing the sands situate along the southerly and extreme southwesterly shore of said Island, being the sands situate between high and low tides, heretofore described and referred to as the area embraced in yellow on the map hereto attached and marked Exhibit "A" hereof, and to conduct fishing operations thereon, and unless said defendants, and each of them, are restrained by this court from entering upon and repeating the occupancy of said premises without right or authority as aforesaid, the said defendants will occupy the said fishing sites and locations for the fishing season of 1933 and succeeding years, to the irreparable injury and damage of plaintiff.

FINDING OF FACT No. 8

That the defendants have no right, title and/or interest in and to Sand Island and/or the sands which abut therefrom between high and low tides and which have heretofore been more particularly described by reference to the map and chart marked Exhibit "A" and with particular reference to the area on said map defined in yellow, and said defendants have never enjoyed rights or interests therein, save such as were obtained by said defendants by and under leases regularly entered into between said defendants, or either or any of them, and the plaintiff, United States of America; that said defendants should be restrained from conduct-

ing fishing operations on said premises and occupying the same.

FINDING OF FACT No. 9

That plaintiff has no plain, speedy or adequate remedy at law.

And the Court, being fully advised in the premises, does find the following: [47]

CONCLUSION OF LAW No. 1

That the State of Oregon granted to plaintiff, United States of America, on the 21st day of October, 1864, and unqualified fee in and to Sand Island, which said Island was described in the Legislative Act granting said premises as follows:

> "Section 1. There is hereby granted to the United States all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject, to overflow between high and low tides, and also to Sand Island, situate at the mouth of the Columbia River in this state; the said island being subject to overflow between high and low tides."

That the said Sand Island is and for many years last past has been located within Clatsop County, State of Oregon, and within the jurisdiction of this Court; that for many years last past, save for the occupation of said premises under licenses and leases executed by plaintiff from time to time and save for the encroachment of defendants as of the years 1933 and 1934, as hereinafter recited, plaintiff has

been entitled to the exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.

CONCLUSION OF LAW No. 2

That the North Ship Channel of the Columbia River is an existent channel, which takes a course westerly and northerly of Sand Island through Baker Bay and proceeds thence southerly into the main or south channel of the Columbia River between the eastern shore of Cape Disappointment, within the State of Washington, and the westerly shore of Sand Island; the said channel as so constituted marks the boundary line between the States of Oregon and Washington.

CONCLUSION OF LAW No. 3

That the Columbia River Packers Association, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing [48] under and by virtue of the laws of the State of Oregon and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

That the Baker's Bay Fish Company, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now

is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries

CONCLUSION OF LAW No. 4

That the sands abutting upon and from the main land of Sand Island and which form the southerly and extreme southwesterly shore line thereof between high and low tides have formed as accretions and additions to Sand Island and are a part and parcel thereof and the property of the United States of America. The southerly and extreme southwesterly shore line of Sand Island abuts upon and faces, without obstruction, the main body of the Columbia River, and the westerly portion of said shore line embraces certain fishing sites and locations situate upon sands which abut from the main land of Sand Island and which are subject to overflow between high and low tides, which said fishing locations are more particularly described by reference to the map and chart hereto attached, marked Exhibit "A" and made a part hereof, and the same are designated by the area circumscribed and defined in yellow thereon and hereinafter referred to as the "fishing sites and locations."

CONCLUSION OF LAW No. 5

That that certain lease or license granted by plaintiff to the Columbia River Packers Association,

defendant herein, and H. J. Barbey, defendant herein, under date of March 27, 1930, and which by its provisions was to extend for a period of five years from the date of its execution, was legally valid and binding and permitted occupancy of the fishing sites and locations hereinabove defined by said defendants up [49] to and until the 10th day of May, 1932, when the same was legally cancelled; that thereafter and during the fishing seasons of the years 1933 and 1934, respectively, the occupancy of Sand Island and the fishing sites and the locations aforesaid, appurtenant thereto, by said defendants was without right and constituted a trespass upon said properties and a violation and encroachment upon the right of the United States to have and hold absolute and exclusive possession of said Sand Island.

CONCLUSION OF LAW No. 6

That said defendants, and each of them, are without right, title, or interest in and to Sand Island or any part thereof, including the sands which have formed as accretions to Sand Island as aforesaid and which embrace the fishing sites and locations hereinabove more particularly described.

CONCLUSION OF LAW No. 7

That the defendants have threatened and are now threatening to enter upon the fishing sites and locations upon Sand Island heretofore described and to conduct fishing operations thereon, and unless defendants are permanently restrained and enjoined

from entering upon and conducting fishing operations upon said fishing sites and locations, the plaintiff herein will suffer irreparable injury and damage.

CONCLUSION OF LAW No. 8

That a decree should be entered herein enjoining the said Columbia River Packers Association, Baker's Bay Fish Company, and H. J. Barbey, permanently inhibiting and restraining said defendants, and each of them, and all their officers and agents and employees, from entering upon or occupying Sand Island and any part thereof, including the sands abutting therefrom and which form a part thereof, as aforesaid, and which embrace the fishing sites and locations hereinabove more particularly described and referred to.

CONCLUSION OF LAW No. 9

That plaintiff has no plain, speedy or adequate remedy at law. [50]

CONCLUSION OF LAW No. 10

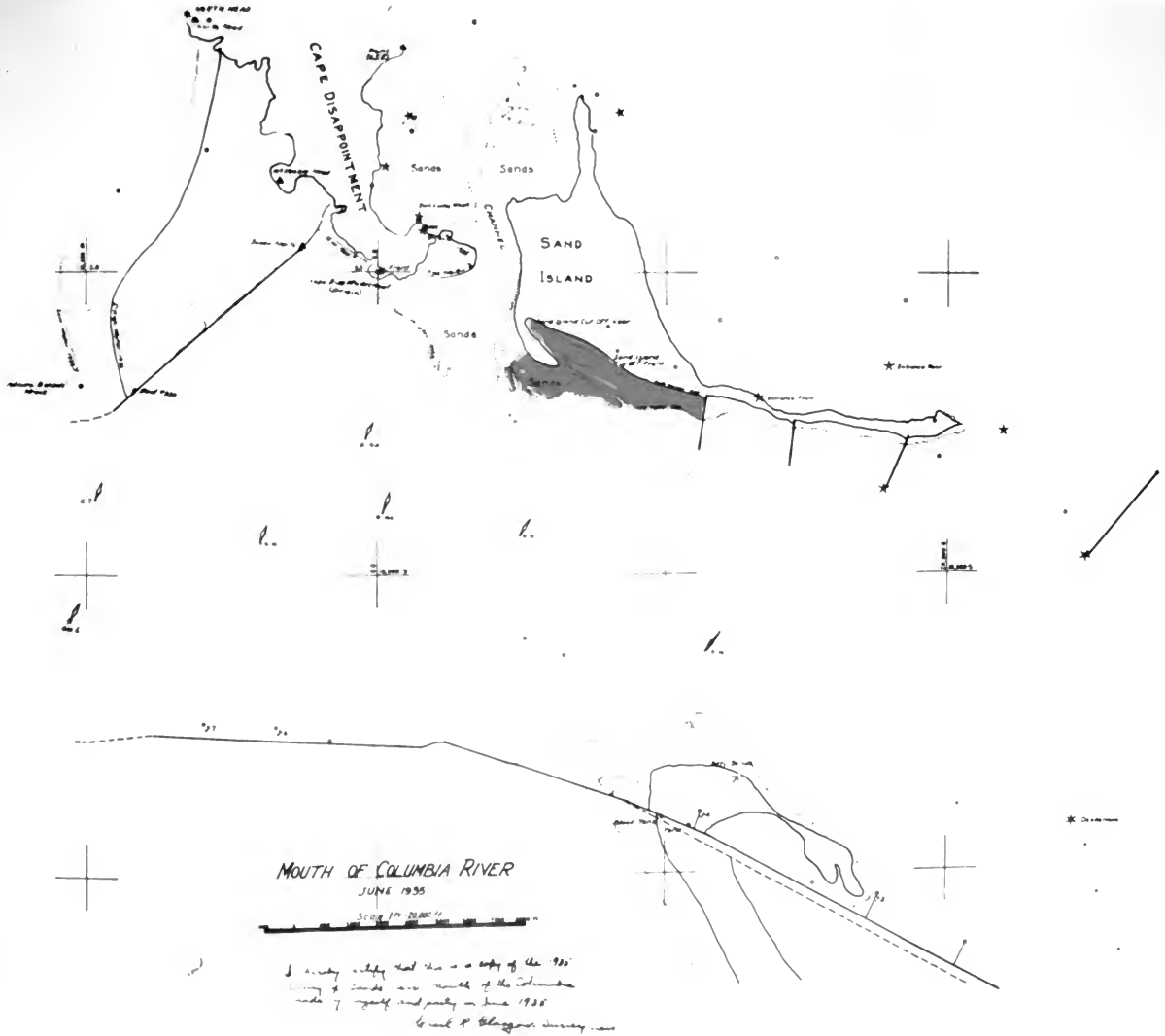
That plaintiff is entitled to recover of and from the defendants its costs and disbursements incurred herein.

To all of which the defendants, and each of them, do hereby except and exception allowed.

Dated at Portland, Oregon, this 9th day of August, 1935.

CHARLES C. CAVANAH
District Judge.

[Endorsed] Filed August 9, 1935. [51]


CAPE DISAPPOINTMENT
Sands
Sands
SAND
ISLAND
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Sands
MOUTH OF COLUMBIA RIVER
JUNE 1935

EXHIBIT "A".

AND AFTERWARDS, to wit, on Friday, the 9th day of August, 1935, the same being the 30th Judicial day of the Regular July Term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [53]

In the District Court of the United States
for the District of Oregon

No. E-9471

UNITED STATES OF AMERICA,
Plaintiff,

vs.

COLUMBIA RIVER PACKERS ASSOCIATION, a corporation; BAKER'S BAY FISH COMPANY, a corporation; and H. J. BARBEY,
Defendants.

DECREE

On the 11th day of June, 1935, upon bill of complaint, answer and reply, and full proofs of the respective parties, comprising testimony of numerous witnesses, who were subjected to cross-examination and documentary proofs, plaintiff, United States of America, appearing and being represented by Edwin D. Hicks, Assistant United States Attorney for the District of Oregon, defendants appearing jointly and being represented by the Honorable A. E. Clark and the Honorable Jay Bowerman, and the

said attorneys for the respective parties having been heard orally and upon briefs filed herein, and the Court being fully advised in the premises,

NOW THEREFORE, upon consideration thereof and on motion of the attorney for complainant, it is this day ORDERED, ADJUDGED AND DECREED as follows, viz:

FIRST: That plaintiff is the owner and entitled to the immediate and exclusive possession of that tract of land and island known as Sand Island which said island is described as follows:

> That certain island commonly known and referred to as Sand Island, situate within the estuary and near the mouth of the Columbia River, United States of America, within Clatsop County, State of Oregon.
>
> The said Sand Island is bordered on the north and east by a body of water styled as Baker Bay, on the south by the main body of the Columbia River, and on the west by a channel of water leading from Baker Bay into the main Columbia River, which said channel is commonly known and referred to as the [54] North ship channel of the Columbia River;

that said description embraces all sands and tide flats between high and low water abutting upon and projecting from Sand Island, with particular reference to the sands and tide flats situate along the southerly and westerly shore of said Island, which it is hereby decreed have become a part and parcel

of Sand Island by process of accretion. For a more particular description of Sand Island, reference is made to the map and chart hereto attached marked exhibit "A" and made a part hereof. The area designated on Sand Island as "Sands" and colored in yellow is the area which is hereby decreed to have formed as an accretion to Sand Island.

SECOND: That the defendants, and each or any of them, have no right, title or interest in and to Sand Island and/or the sands abutting therefrom on the southerly and westerly shore thereof, being the sands above-mentioned which have formed as accretions to said Island.

THIRD: That a permanent injunction issue out of and under the seal of this court, directed to the defendants, Columbia River Packers' Association, a corporation; Baker's Bay Fish Company, a corporation, and H. J. Barbey, and their officers, agents, servants, employees and attorneys, and those in active concern or participating with them, and each and every of them, enjoining and restraining them, and each of them, from occupying or attempting to occupy Sand Island and/or the sands and tideflats situate upon the southerly and westerly shore thereof between high and low tides and which are herein decreed to form a part of said Island.

This direction shall not apply to said defendants, or any of them, where such occupancy is undertaken pursuant to leases or licenses which may be granted by the United States of America or its successors in interest authorizing such occupancy.

FOURTH: That the motion of defendants to dismiss the bill of complaint herein, as amended, for want of jurisdiction and for want of parties be, and it hereby is, denied.

FIFTH: That the United States of America, plaintiff, do recover [55] from the defendants its costs of this suit, to be taxed by the Clerk.

The defendants and each of them except and exception allowed.

Dated at Portland, Oregon, this 9th day of August, 1935.

CHARLES C. CAVANAH

[Printer's Note: Attached to the original Decree is a map Exhibit "A". Being identical with the map Exhibit "A" shown at end of the Findings of Fact and Conclusions of Law [see p. 58] it is not, for reasons of economy, again shown here.]

[Endorsed]: Filed August 9, 1935. [56]

AND AFTERWARDS, to wit, on the 31st day of October, 1935, there was duly filed in said Court, a PETITION FOR APPEAL, in words and figures as follows, to-wit: [58]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Petitioners, Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation and H. J. Barbey, defendants above named, conceiving themselves aggrieved by the Decree, made and entered in this suit on the 9th day of August, 1935, in the above entitled court and cause, do hereby appeal from said Decree, and the whole thereof, to the United States Circuit Court of Appeals, for the Ninth Circuit, and hereby file their Assignments of Error asserted and relied upon by them upon said appeal, and petitioners pray that said appeal may be allowed, that citation issue herein as provided by law, that an order be entered herein fixing the amount of the bond to be given by petitioners upon such appeal, the same to act as a cost bond, and that a transcript of the record, proceedings and papers upon which said decree was made and entered be duly authenticated and sent to the [59] United States Circuit Court of Appeals, for the Ninth Circuit sitting in San Francisco.

Dated this 31st day of October, 1935.

COLUMBIA RIVER PACKERS
ASSOCIATION,
by W. L. THOMPSON, Pres.
BAKER'S BAY FISH COMPANY,
by W. L. THOMPSON, Pres.
H. J. BARBEY

Petitioners.

CLARK & CLARK
JAY BOWERMAN
Solicitors for Petitioners-Defendants. [60]

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Petition for Appeal is hereby accepted this 31st day of October, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark, of attorneys for defendants-petitioners.

UNITED STATES OF AMERICA,
by CARL C. DONAUGH,
United States Attorney,
Attorney for plff.

State of Oregon,
County of Multnomah,
District of Oregon.—ss.

Due and timely service of the foregoing Petition for Allowance of Appeal, together with receipt of a copy thereof duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is

hereby admitted at Portland, Oregon, this 31 day of October, 1935.

I. H. VAN WINKLE
Attorney General of the State of Oregon.
RALPH E. MOODY,
Attorney for the State of Oregon.

Due and timely service of the attached Defendants' petition for appeal by receipt of a true copy thereof, acknowledged this 31st day of October, 1935.

G. W. HAMILTON,
Attorney General of the State of Washington.
R. G. SHARPE,
Assistant Attorney General of the State of Washington,
Attorneys for the State of Washington.

[Endorsed]: Filed October 31, 1935. [61]

AND AFTERWARDS, to wit, on the 31st day of October, 1935, there was duly filed in said Court, an ASSIGNMENT OF ERRORS, in words and figures as follows, to-wit: [62]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR

Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation and H. J. Barbey, the defendants above named, complain of the Findings of Fact and Conclusions of

Law and the final Decree made and entered in the above entitled cause on the 9th day of August, 1935, and aver that in the proceedings in said cause, and in said Findings of Fact, Conclusions of Law and in said Decree found, manifest error has occurred to the prejudice of defendants, of which they make the following

ASSIGNMENTS OF ERROR

which they assert and intend to urge and rely upon in the Circuit Court of Appeals for the Ninth Circuit, upon their appeal herein:

I.

Error in finding and holding that a map or chart attached to the Findings of Fact and Conclusions of Law as Exhibit "A," was a complete and detailed description of Sand Island and its appurtenants, and in holding that said map [63] shows the approximate location of Sand Island with the sands abutting from the southerly shore thereof, and in holding that said exhibit is either a complete detailed or accurate description of Sand Island.

II.

Error in finding and holding, in substance, that the defendants encroached upon any of the rights or premises of the plaintiff in the years 1933 and 1934, or either of said years; and in finding and holding, in substance, that Exhibit "A" was a true description of Sand Island and that the plaintiff owned the property shown on said Exhibit "A"

and was in the exclusive possession thereof for many years, or at all.

III.

Error in holding and finding, in substance, that the North Ship Channel of the Columbia River proceeds from Baker's Bay southerly into the west or south channel of the Columbia River between the eastern shore of Cape Disappointment within the State of Washington, and the westerly shore of Sand Island as delineated on said map, Exhibit "A", and in finding and holding that the said channel so described in said Findings marks the boundary line between the states of Oregon and Washington, and in making any holding or finding with respect to the boundary line between said states.

IV.

Error in finding and holding, in substance, that there is abutting from Sand Island a body of sands which forms the southerly and extreme southwesterly shore line of said island, and in finding and holding that the same is subject to overflow between high and low tide. [64]

V.

Error in finding and holding, in substance, that the area colored in yellow on said Exhibit "A" is a part of Sand Island.

VI.

Error in finding and holding, in substance, that the body of sands south and west of Sand Island

and colored in yellow in said Exhibit "A" are accretions to Sand Island formed through slow and imperceptible process, or that they constitute an accretion to and are a part of Sand Island.

VII.

Error in finding and holding, in substance, that the southerly and extreme southwesterly shore line of Sand Island abuts upon and faces without obstruction the main body of the Columbia River, and embraces fishing sites and locations situate westerly of the most westerly dike on said Sand Island.

VIII.

Error in finding and holding, in substance, that the westerly and southwesterly shores of Sand Island are peculiarly adapted for the drawing of seines and floating fish gear, and that they have had, at the times mentioned in the findings, and now have, great or any value as locations for carrying on fishing operations.

IX.

Error in finding and holding, in substance, that Sites Nos. 1, 2, 3, 4 and 5, described in the lease dated March 27, 1930, between the United States as lessor, and the defendants H. J. Barbey and Columbia River Packers Association as lessees, embrace a continuous area along the southerly and extreme southwesterly shore of Sand Island. [65]

X.

Error in finding and holding, in substance, that after August 25, 1931, and during the fishing seasons of 1933 and 1934, or at all, the defendants used or continued to use that portion of said fishing Sites Nos. 1, 2, 3, 4 and 5 referred to in the last preceding Assignment of Error westerly of the most westerly dike situated on the south shore of Sand Island, or that said defendants, or either thereof, after August 25, 1931, used or occupied any part of Sand Island or the shore thereof for fishing operations or for any other use or purpose whatsoever.

XI.

Error in finding and holding, in substance, that the defendants, or either thereof, at any time after August 25, 1931, entered upon or threatened to enter upon the above described fishing sites and locations on Sand Island, or any part of *Said* Island whatsoever, or to use the southerly and extreme southwesterly shore line of said island, or any part thereof, for fishing operations or for any purpose whatsoever; and in finding and holding, in substance, that at the time this suit was commenced, or at any time thereafter, or when the said Findings, Conclusions and Decree were entered, the defendants, or either thereof, threatened, intended or had any purpose to enter upon said fishing sites, or any part of Sand Island for any purpose whatsoever.

XII.

Error in finding and holding, in substance, and effect, that the defendants, or either thereof, at

the time this suit was commenced, or at any time thereafter, threatened or intended to enter upon any part of Sand Island or any part [66] of the premises in dispute in this suit, to conduct fishing operations thereon, or for any other purpose.

XIII.

Error in finding and holding, in substance and effect, that unless restrained the said defendants will occupy the said fishing sites and locations for fishing operations in the season of 1935 and succeeding years.

XIV.

Error in finding and holding that the defendants have no right, title or interest in Sand Island or the sands lying southerly or southwesterly thereof, and that defendants never enjoyed any rights or interest therein save such as were given by leases executed by the United States.

XV.

Error in finding and holding that the plaintiff has no plain, speedy or adequate remedy at law.

XVI.

Error in reiterating all of the aforechallenged findings in the several Conclusions of Law.

XVII.

Error in decreeing that plaintiff is the owner and entitled to the immediate and exclusive possession of the tract of land known as Sand Island, and

"that said Sand Island is bordered on the north and east by a body of water styled as Baker's Bay, and on the west by a channel of water leading from Baker's Bay into the main Columbia River, which said channel is commonly known and referred to as the North Ship Channel of the Columbia River."

XVIII.

Error in decreeing that Sand Island embraces all sands and tide flats between high and low water abutting upon and projecting from Sand Island, with particular reference to [67] the sands and tide flats along the southerly and westerly shore of Sand Island.

XIX.

Error in decreeing that said sands, which are the premises in dispute in this suit, became a part and parcel of Sand Island by accretion.

XX.

Error in decreeing that the defendants, and each of them, have no right, title or interest in or to Sand Island as above described.

XXI.

Error in decreeing that a permanent injunction issue against the defendants, their officers, agents, servants, employees and attorneys, enjoining and restraining them, and each of them, from occupying

or attempting to occupy the sands or tide flats southerly and westerly along the southerly and westerly shore of Sand Island, which are the premises in dispute herein.

XXII.

Error in denying the motion of defendants to dismiss the bill of complaint and this suit because of the absence of indispensable parties and because the Court had no jurisdiction.

XXIII.

Error in denying the motion of the State of Washington for leave to intervene in this suit.

XXIV.

Error in denying the motion of the State of Oregon for leave to intervene in this suit.

XXV.

Error in decreeing that the plaintiff was the owner [68] of the premises in controversy in this suit, or that the same, or any part thereof, constituted an accretion to Sand Island.

XXVI.

Error in decreeing that neither the State of Oregon nor the State of Washington was an indispensable party, and that the Court had jurisdiction without their presence to enter a decree other than a decree of dismissal.

XXVII.

Error in not entering a decree of dismissal in this suit.

XXVIII.

Error in decreeing that plaintiff should recover from defendants its costs and disbursements.

WHEREFORE Defendants-appellants pray that the decree may be reversed.

COLUMBIA RIVER PACKERS ASSOCIATION
By W. L. THOMPSON
BAKER'S BAY FISH COMPANY
By W. L. THOMPSON
H. J. BARBEY

CLARK & CLARK
JAY BOWERMAN
Attorneys for Defendants-Appellants. [69]

District of Oregon,
State of Oregon,
County of Multnomah—ss.

Due service of the within Assignments of Error is hereby accepted in Multnomah County, Oregon, this 31 day of October, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark of Attorneys for Defendants.

CARL C. DONAUGH
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,
District of Oregon—ss.

Due and timely service of the foregoing Assignments of Error, together with receipt of a copy thereof duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is hereby admitted at Portland, Oregon, this 31st day of October, 1935.

I. H. VAN WINKLE
Attorney General of the State of Oregon.
RALPH E. MOODY,
Ass't Atty. Gen'l
Attorneys for the State of Oregon.

Due and timely service of the attached Defendant's assignments of error by receipt of a true copy thereof, acknowledged this 31st day of October, 1935.

G. W. HAMILTON
Attorney General of the State of Washington
R. G. SHARPE
Assistant Attorney General of the State of Washington,
Attorneys for the State of Washington.

[Endorsed]: Filed October 31, 1935. [70]

AND AFTERWARDS, to wit, on Saturday, the 1st day of November, 1935, the same being the 79th judicial day of the regular July, 1935, term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [71]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

The defendants in the above entitled cause having prayed for the allowance of an appeal in this cause to the United States Circuit Court of Appeals, for the Ninth Circuit, from the Decree made and entered in said cause by the District Court of the United States, for the District of Oregon, on August 9th, 1935, and from each and every part thereof, and having presented and filed their petition for appeal, assignments of error and prayer for reversal, pursuant to the statutes and rules in such cases provided, it is therefore,

ORDERED that the petition of said defendants for the allowance of an appeal, and their said appeal to the United States Circuit Court of Appeals, for the Ninth Circuit be, and the same are hereby granted and allowed, and it is further

ORDERED that the amount of the bond on said appeal to be given by the said defendants to act as a cost bond be, and the same is hereby fixed at the sum of $300.00, and it is further

ORDERED that the Clerk of this Court prepare and certify a transcript of the record, proceedings

and decree in this cause and all other papers and documents pertinent to and necessary for a determination of said appeal and transmit the same to the [72] United States Circuit Court of Appeals, for the Ninth Circuit, within the time and in the manner provided by the statutes of the United States and the rules of Court.

Dated this 1st day of November, 1935.

CHARLES C. CAVANAH
Judge of the United States District Court, for the District of Oregon, presiding in said cause.

District of Oregon,
State of Oregon,
County of Multnomah—ss.

Due service of the within Order allowing Appeal, is hereby accepted in Multnomah County, Oregon, this 3rd day of November, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark, of attorneys for Defendants.

EDWIN D. HICKS,
Of Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,
District of Oregon—ss.

Due and timely service of the foregoing Order Allowing Appeal and Fixing Bond, together with the receipt of a copy thereof duly certified as such by A. E. Clark, one of the attorneys for defendants-

appellants, is hereby admitted at Portland, Oregon, this 3rd day of November, 1935.

I. H. VAN WINKLE
Attorney General of the State of Oregon.
RALPH E. MOODY
Attorney for the State of Oregon.

Due and timely service of the attached Order Allowing Appeal by defendants by receipt of a true copy thereof, acknowledged this 3rd day of November, 1935.

G. W. HAMILTON
Attorney General of the State of Washington.
R. G. SHARPE,
Assistant Attorney General of the State of Washington.
Attorneys for the State of Washington.

[Endorsed]: Filed November 2, 1935. [73]

AND AFTERWARDS, to wit, on the 7th day of November, 1935, there was duly filed in said Court, a BOND ON APPEAL, in words and figures as follows, to wit: [74]

[Title of Court and Cause.]

COST BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS That Columbia River Packers Association, a cor-

poration, Baker's Bay Fish Company, a corporation, and H. J. Barbey, as principals, and United States Fidelity and Guaranty Company, a corporation authorized to transact business in the State of Oregon, as surety, are held and firmly bound unto the United States of America, the above named plaintiff, and to the State of Oregon and to the State of Washington, petitioners for leave to intervene, and to each of them, in the just and full sum of $300.00, for which sum well and truly to be paid, said defendants bind themselves and their successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 2nd day of Nov., 1935.

The condition of this obligation is such that

WHEREAS, on the 9th day of August, 1935, a decree was made and entered in the above entitled court and cause and defendants have petitioned for and have been allowed an appeal from said decree to the United States Circuit Court of Appeals, for the [75] Ninth Circuit to correct and reverse the said decree, and

WHEREAS the said District Court has by order fixed the bond or security to be given upon said appeal in the sum of $300.00,

NOW, THEREFORE, the condition of this obligation is such that, if the above-named defendants and appellants, Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation, and H. J. Barbey, shall prosecute said

appeal to effect and answer all costs that may be awarded against them, or either of them, if they or either of them shall fail to make good their appeal and plea, then this obligation shall be void, otherwise to remain in full force and effect.

COLUMBIA RIVER PACKERS
ASSOCIATION,
by W. L. THOMPSON, Pres.
BAKER'S BAY FISH COMPANY
by W. L. THOMPSON, Pres.
H. J. BARBEY
Principals.
UNITED STATES FIDELITY
AND GUARANTY COMPANY
By G. B. ECKLES,
Its Attorney in Fact.

[Seal] Surety.

Countersigned
R. W. SCHMEER CO.
By J. H. SCHMEER,
Resident Agent.

Approved
EDWIN D. HICKS,
Asst. U. S. Attorney.

The foregoing undertaking is accepted and approved, both as to form and as to surety.

CHARLES C. CAVANAH,
District Judge for the District of Oregon,
presiding in said cause. [76]

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Cost Bond on Appeal is hereby accepted this 4th day of November, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark, of attorneys for defendants.

UNITED STATES OF AMERICA,
by EDWIN D. HICKS
United States Attorney.

State of Oregon,
County of Multnomah,
District of Oregon.—ss.

Due and timely service of the foregoing Bond on Appeal together with receipt of a copy thereof, duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is hereby admitted at Portland, Oregon, this 4 day of November, 1935.

I. H. VAN WINKLE
Attorney General of the State of Oregon
RALPH E. MOODY
Attorney for the State of Oregon

Due and timely service of the attached Bond on appeal of defendants by receipt of a true copy thereof, acknowledged this 4th day of November, 1935.

G. W. HAMILTON
Attorney General of the State of Washington
R. G. SHARPE
Assistant Attorney General of the State of Washington
Attorneys for the State of Washington

[Endorsed]: Filed November 7, 1935. [77]

AND, to wit, on the 5th day of November, 1935, there was duly filed in said Court, a STIPULATION BETWEEN DEFENDANTS AND THE STATE OF OREGON TO SEND ORIGINAL EXHIBITS TO COURT OF APPEALS, in words and figures as follows, to wit: [78]

[Title of Court and Cause.]

STIPULATION

It is stipulated between the defendants and the State of Oregon that Plaintiff's Exhibits 1, 5, 6, 24, 29, 30 and 31, and Defendants' Exhibits 14, 15, 16, 17, 18, and 19A, 19B, 19C and 19D, consisting of maps, blueprints and photographs, are of such nature that it is impossible to incorporate the same in the printed record and the originals shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit for its use and inspection, and that an order may be entered accordingly.

CLARK & CLARK
JAY BOWERMAN
Attorneys for Defendants
I. H. VAN WINKLE
Attorney General
R. E. MOODY
Ass't Att'y Gen'l
Attorneys for State of Oregon

[Endorsed]: Filed November 5, 1935. [79]

AND AFTERWARDS, to wit, on the 5th day of November, 1935, there was duly filed in said Court, a STIPULATION BETWEEN DEFENDANTS AND THE STATE OF WASHINGTON TO SEND ORIGINAL EXHIBITS TO THE COURT OF APPEALS, in words and figures as follows, to wit: [80]

[Title of Court and Cause.]

STIPULATION

It is stipulated between the defendants and the State of Washington that Plaintiff's Exhibits 1, 5, 6, 24, 29, 30 and 31, and Defendants' Exhibits 14, 15, 16, 17, 18, and 19A, 19B, 19C, and 19D, consisting of maps, blueprints and photographs, are of such nature that it is impossible to incorporate the same in the printed record and the originals shall be transmitted to the Circuit Court of Appeals for the Ninth Circuit for its use and inspection and that an order may be entered accordingly.

CLARK & CLARK,
JAY BOWERMAN
Attorneys for Defendants.
G. W. HAMILTON &
R. G. SHARPE,
Attorneys for State of Washington.

[Endorsed]: Filed November 5, 1935. [81]

AND AFTERWARDS, to wit, on Thursday, the 7th day of November, 1935, the same being the 4th Judicial Day of the Regular November, 1935 Term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [82]

[Title of Court and Cause.]

ORDER

IT IS HEREBY ORDERED that the Court does hereby identify as received and considered in evidence in the above entitled cause Plaintiff's Exhibits 1, 2, 3, 5, 6, 24, 25, 29, 30 and 31, and Defendants' Exhibits 8, 9, 14, 15, 16, 17, 18, and 19A, 19B, 19C and 19D, 20, 21, 22 and 23, which said Exhibits are stamped and marked as filed in the United States District Court for the District of Oregon, in said cause, and does hereby declare the same as a part of the record on appeal in said cause; And It Is Further

ORDERED That the printing of said exhibits, and each of them, may be omitted, and that it shall not be necessary to print the same as a part of the record in said cause except in so far as the same are contained in the statement of the evidence; And It Is Further

ORDERED, That Plaintiff's Exhibits 1, 5, 6, 24, 29, 30 and 31, and Defendants' Exhibits 14, 15, 16, 17, 18, and 19A, 19B, 19C and 19D cannot be readily copied, and because of the character thereof it is impracticable and impossible to incorporate the

same in the printed record, and that the originals, [83] in lieu of such printing, shall be transmitted to the Circuit Court of Appeals for its use and inspection; And It Is Further

ORDERED, That all of the original exhibits shall be transmitted to the Clerk of the Circuit Court of Appeals at or before the time of argument of this cause on appeal.

Done and dated in open Court this 6th day of November, 1935.

CHARLES C. CAVANAH
District Judge for the District of Oregon, presiding in said cause.

Approved this 4th day of Nov. 1935.
EDWIN D. HICKS,
Ass't U. S. Att'y.

[Endorsed]: Filed November 7, 1935. [84]

AND, to wit, on the 6th day of November, 1935, there was duly filed in said Court, a PRAECIPE FOR TRANSCRIPT, in words and figures as follows, to wit: [85]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the Above-entitled Court:

You will please prepare and certify the record on appeal in the above entitled cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein all papers and

proceedings had in the above-entitled cause which are necessary to the determination thereof in said Appellate Court and especially the following:

(1) This Praecipe.
(2) Second Amended Bill of Complaint.
(3) Answer of Defendants to Amended Bill of Complaint.
(4) Findings of Fact and Conclusions of Law.
(5) Final Decree.
(6) Defendants-Appellants' Assignments of Error.
(7) Petition for Appeal.
(8) Order Allowing Appeal and Fixing Bond.
(9) Bond on Appeal.
(10) Citation on Appeal.
(11) Order Regarding Exhibits.
(12) Statement of Evidence and Trial Record.

[86]

(13) Stipulation for extension of time for plaintiff to propose amendments to statement of evidence and presentation to the Court.
(14) Order extending time therefor.

You are to certify each and all of Plaintiff's Exhibits 1, 2, 3, 5, 6, 24, 25, 29, 30 and 31 and Defendants' Exhibits 8, 9, 14, 15, 16, 17, 18, 19-A, 19-B, 19-C, 19-D, 20, 21, 22 and 23, the same not to be printed, except in so far as they are reproduced in the statement of evidence but to be made a part of the record on appeal.

Dated this 5th day of November, 1935.

CLARK & CLARK and
JAY BOWERMAN
Solicitors for Defendants-Appellants. [87]

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Praecipe for Transcript is hereby accepted in Multnomah County, Oregon, this 5th day of November, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark of Attorneys for Defendants.

EDWIN D. HICKS
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,
District of Oregon.—ss.

Due and timely service of the foregoing Praecipe for Transcript on Appeal is hereby admitted, at Salem, Oregon, this 5th day of November, 1935, by receipt of a copy thereof, certified as such by A. E. Clark, one of the attorneys for defendants-appellants.

I. H. VAN WINKLE
Attorney General of the State of Oregon.
RALPH E. MOODY
Assistant Attorney General,
Attorneys for the State of Oregon.

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the foregoing Praecipe for Transcript on Appeal of the defendants on appeal in suit No. E-9471, in the District Court of the United States, for the District of Oregon, wherein the

United States of America *in* plaintiff and Columbia River Packers Association, a corporation, Bakee's Bay Fish Company, a corporation, and H. J. Barbey are defendants, and receipt of a true copy thereof, duly certified to be such by A. E. Clark, one of the attorneys for the defendants, is hereby acknowledged at Portland, Oregon, this 5th day of November, 1935.

G. W. HAMILTON &
R. G. SHARPE
Attorneys for the State of Washington.

[Endorsed]: Filed November 5, 1935. [88]

AND AFTERWARDS, to wit, on the 7th day of November, 1935, there was duly filed in said Court, a STIPULATION FOR ORDER ENLARGING TIME TO PROPOSE OBJECTIONS OR AMENDMENTS TO PROPOSED STATEMENT OF THE EVIDENCE, in words and figures as follows, to wit: [89]

[Title of Court and Cause.]

STIPULATION

WHEREAS a statement of the evidence and trial record in this suit was heretofore prepared and lodged with the Clerk of the above-entitled court by defendants for examination of plaintiff and notice thereof given as provided in subdivision (b) of Equity Rule 75 and that because of trial engagements and other professional engagements the

solicitors for plaintiff have not had time and opportunity to prepare the objections and amendments thereto which they desire to propose. It is therefore STIPULATED by and between the solicitors of record for the plaintiff and defendants that an order may be entered herein extending the time for proposing objections and amendments and the presentation of said statement of evidence to the Court for its approval to and including November 20th, 1935.

Dated this 5th day of November, 1935.

EDWIN D. HICKS
Solicitors for Plaintiff.

CLARK & CLARK
JAY BOWERMAN
Solicitors for Defendants.

[Endorsed]: Filed November 7, 1935. [90]

AND AFTERWARDS, to wit, on Thursday, the 7th day of November, 1935, the same being the 4th Judicial Day of the Regular November, 1935 Term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [91]

[Title of Court and Cause.]

ORDER EXTENDING TIME.

Based upon the stipulation of the parties to this suit through their solicitors of record, and for good cause shown, it is hereby

ORDERED that the time within which the plaintiff may make objections and propose amendments to the statement of the evidence and trial record, heretofore lodged with the Clerk of the above-entitled Court, and the presentation of said objections and proposed amendments and said statement to the Court for its approval, is hereby extended to and including November 20, 1935.

Dated this 6th day of November, 1935.

CHARLES C. CAVANAH

Judge of the United States District Court for the District of Oregon, presiding in the above-entitled cause.

[Endorsed]: Filed November 7, 1935. [92]

AND AFTERWARDS, to wit, on the 19th day of November, 1935, there was duly filed in said Court, a STIPULATION RELATIVE TO ORIGINAL EXHIBITS, in words and figures as follows, to wit: [93]

[Title of Court and Cause.]

STIPULATION.

It is STIPULATED by and between the plaintiff and defendants herein, through their respective solicitors of record, that an order may be entered herein

(a) That the original exhibits in this case shall be retained in the custody of the clerk of the above-entitled court at Portland, Oregon, for use of the

parties in the preparation of their briefs, and shall be transmitted to the clerk of the Circuit Court of Appeals a convenient time before argument of the cause in said Court; and

(b) That there shall be transmitted by the clerk of said District Court to the clerk of the Circuit Court of Appeals a convenient time before the argument of this cause in the last named court the transcript of the evidence and trial record certified by the court reporter, and on file with the clerk of said District Court, and that the solicitors for either party may refer to said transcript in their briefs and arguments and call the attention of the Circuit Court of Appeals to the same, or any part thereof.

Dated this 14 day of November, 1935.

EDWIN D. HICKS
Solicitors for Plaintiff.
CLARK & CLARK
JAY BOWERMAN
Solicitors for Defendant.

[Endorsed]: Filed November 19, 1935. [93½]

AND AFTERWARDS, to wit, on Tuesday, the 19th day of November, 1935, the same being the 13th Judicial day of the Regular November, 1935 Term of said Court; present the Honorable Charles C. Cavanah, United States District Judge for the District of Idaho, presiding, the following proceedings were had in said cause, to wit: [94]

[Title of Court and Cause.]

ORDER.

Based upon the stipulation of the plaintiff and defendants through their respective solicitors of record, and for good cause shown, it is

ORDERED that the original exhibits in this cause shall, for the time being be retained in the custody of the clerk of the above entitled court at Portland, Oregon, for use of the parties in the preparation of their briefs herein, and shall be transmitted to the clerk of the Circuit Court of Appeals a convenient time before the argument of this cause upon appeal. And it is further

ORDERED that the clerk of said District Court shall transmit to the Circuit Court of Appeals a convenient time before argument of this cause on appeal, the transcript of the evidence and trial record made and certified by the court reporter, and filed with the clerk of said District Court, and that either party in their briefs or upon oral argument may refer thereto and call the attention of the Appellate Court to the same or any part thereof, but no part of said transcript shall be printed.

Dated this 18th day of November, 1935.

CHARLES C. CAVANAH
Judge of the United States District Court,
presiding in said cause.

[Endorsed]: Filed November 19, 1935. [94½]

AND AFTERWARDS, to wit, on the 19th day of November, 1935, there was duly filed in said Court, a STATEMENT OF THE EVIDENCE, in words and figures as follows, to wit: [95]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE AND TRIAL RECORD.

The following is defendants-appellants condensed statement in narrative form of what occurred upon and during the trial of this suit and the testimony introduced upon said trial, made in pursuance of Equity Rule 75(b), and lodged in the Clerk's office for the examination of the plaintiff as provided by said rule: [96]

At the opening of the trial, the Court denied the motion of the State of Oregon for leave to intervene and file a petition in intervention, and vacated the conditional order theretofore made by Judge Fee permitting the State of Washington to intervene and file a petition in intervention, and denied the motion of the State of Washington for leave to intervene and file a petition in intervention, and in connection therewith delivered the following oral opinion:

> "COURT: I appreciate, Gentlemen, you have a question of jurisdiction between the United States and the states. We have a statute, as I recall it, which provides that an action between the government and the states involving title to property, the Supreme Court of the United

States has original jurisdiction. The question, I recall, was presented to me some two years ago, in which a controversy arose over the ownership of property as between the government and the State of Idaho. I declined jurisdiction. The question was thoroughly gone into. Under that statute Congress has granted original jurisdiction in the Supreme Court of the United States in controversies over ownership of property between the government and the state. Now, with that [97] statute in mind, if the court permits these petitions for intervention of the States of Oregon and Washington, I will be assuming original jurisdiction here, when it belongs in the Supreme Court of the United States, and I doubt whether any theory of this court would avail you anything at all. Why did Congress enact that statute giving the Supreme Court original jurisdiction? I have an idea that Congress had in mind in giving the Supreme Court original jurisdiction, that it would not involve the District Judges of the different states. Now if these petitions are permitted you are going to have here the statement of counsel both for the states of Oregon and Washington, primarily a question of jurisdiction on the facts, which the court will have to determine. If I would hear this case and permit these states to intervene and the court should finally determine on the evidence that this property is situated in the State of Washington, it divests this court of

jurisdiction at once, and you avail yourself of nothing. If the court should determine that the property is in the State of Oregon, if it had any jurisdiction of course it would retain jurisdiction. If we ignore this statute I call your attention to the original jurisdiction being vested in the Supreme Court of the United [98] States in a controversy of this sort between the government and the states. Now there is your complication. If we take testimony here and the court should conclude the property is situated in Washington it declines jurisdiction and the government goes over in the State of Washington and brings a similar suit, and the State of Oregon raises a similar question, and the judge over there should hold the property was not in the State of Washington, where would you be? You would be in the same situation you would be here. That is the purpose of that statute granting original jurisdiction to the Supreme Court in controversies between the state and the government over the ownership of property. You can see what the result might be. Now the states are not necessary parties in this litigation, as I view it. This court can go on and determine the controversy between the government and these defendants. It is true it would not bind the state of Oregon or the state of Washington. It would only be binding the parties before the court, and that would be the United States and these defendants. If the states of Washington and Ore-

gon afterwards desired to litigate it would probably bring whatever suit it thought proper. And I am under the impression, gentlemen, that this question of jurisdiction is a very serious one, where you have to determine between the two states and the United States government the ownership of this property. It is [99] true the boundary might be said to be involved, but that divests jurisdiction; where is this property, in Oregon, this side of the boundary line, or in Washington?

I am under the impression, gentlemen, that these petitions of intervention should not be allowed, but the case should proceed between the original parties, and you will have to determine hereafter the interests of these states in the proper forum. So you may proceed.

There is a motion to set aside the order allowing the state of Washington to intervene. Is that subject to objection?

Mr. HICKS: Yes."

It was thereupon stipulated between counsel for the plaintiff and the defendants that any affirmative allegations or matter pleaded in the answer to the amended complaint should be deemed denied and that the said answer to the amended complaint should stand as the answer to the second amended complaint which was filed just before the trial.

Thereupon Mr. Devers, Assistant Attorney General of the State of Oregon, made application to the court as follows:

"I want to present another matter to the court on behalf of the State of Oregon, at this time: That is in a case pending where this same sort of a question was raised, the Attorney General of the United States applied for leave to participate in the trial to examine witnesses and to allow them to present an argument to the court, with the understanding that the government [100] was not a party to the case, or would not be bound by the decree. And in behalf of the State of Oregon I make application that a like privilege be extended to the State of Oregon in this proceeding."

Thereupon Mr. Downey, Assistant Attorney General of the State of Washington, made a similar application, in behalf of the State of Washington, in this language:

"Mr. DOWNEY: I make the same application on behalf of the State of Washington, and speaking on that, I know enough about this case to know that this court cannot possibly determine this matter without passing upon the question of whether the land is in Washington or in Oregon."

The court denied the application of the State of Washington and of the State of Oregon, and, in connection therewith, delivered the following oral opinion:

"COURT: Of course if the evidence shows this land is situated in the State of Washington,

then it is a question of jurisdiction, and the court declines jurisdiction. The court has authority upon its own motion to refuse jurisdiction. I don't think it is required for the counsel to call the court's attention to jurisdiction between the original parties, because that is a matter it is the duty of the court to take care of in the proceedings." [101]

* * * * * * *

"That is a peculiar proceeding to me. I understand that has been permitted to be done in instances, but a peculiar proceeding to allow outside parties, not a party to the action, to come into the proceeding and participate in it and question the witnesses, and not be bound by it—just going fishing, that is what they are going. This action should be tried between the original parties. I doubt whether anyone else can come in here and interfere and raise issues and examine witnesses; it would just be an expedition trying to find out something. I am not inclined to allow that kind of a procedure, gentlemen. It would be hard on the litigants, the original parties. They have no pleadings from the parties who want to come in and examine the witnesses; they ought to have an opportunity to know what is going on. I am not inclined to adopt that kind of procedure. I think we will have to try this case between the original parties before the court. You may proceed."

Thereupon counsel for plaintiff stated:

> "Mr. HICKS: May it please the court, I have here a series of maps which purport to trace the history of Sand Island from early days down to the present time. This particular exhibit places the island and the sands attached to it, adjacent sands, Peacock Spit, and the entire matter, up until 1934." [102]

Said maps were received in evidence and marked Exhibit 1. It is not practicable to make copies and the originals will be transmitted to the Circuit Court of Appeals together with two additional duplicates for the convenience of the members of the court. The exhibit consists of maps of the waters of the lower Columbia River and vicinity, compiled under the direction of the United States Engineers or the Coast Geodetic Survey for the years 1854, 1870, 1876, 1879, 1880, 1881, 1883, 1885, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933 and 1934.

Thereupon counsel for plaintiff offered in evidence a summary purporting to show the leases made by the United States on Sand Island, or parts thereof, between June 30, 1880 and May 1st, 1930, the annual rentals received and the total rentals received, and said statement was received in evidence as Exhibit 2, without objection but with the

statement by counsel for defendants that it must be understood that the statement does not show the rental on individual sites, or the annual rental received on any particular site, but merely the gross rentals received from all tenants for a given year. Said Exhibit is as follows:

GOVERNMENT'S EXHIBIT 2

"Leases made with respect to Sand Island from and between the 30th day of June, 1880, and the 1st of May, 1930:

No.		Term (Years)	From	Annual Rental	Total Received
1	J. W. and V. Cook	1	June 30, 1880	$ 509	$ 509
2	T. A. O. Stensland	3	June 1, 1905	1,920*	4,800
3	Howard Winter	3	do	1,500*	3,750
4	Walter L. Pulliam	3	do	1,000*	2,500
5	Hansen and Olsen	3	do	750*	1,875
6	Cris Hansen	3	May 1, 1908	150	450
7	Columbia River Packers' Assn.	3	do	5,175	15,525
8	John Service	3	do	1,450	4,350
					[103]
9	Alex Muller	3	May 1, 1911	86	238
10	Booth Fisheries Co.	3	do	210	630
11	Columbia R. Packers' Assn.	3	do	12,509	37,527
12	do	1	May 1, 1914	6,918	6,918
13	W. E. Tallant	1	do	8,380	8,380
14	Stuart Davis	1	do	281	281
15	do	1	May 1, 1915	11,474	11,474
16	W. E. Tallant	1	do	1,750	1,750
17	Columbia R. Packers' Assn.	1	do	650	650
18	Tallant-Grant Packing Co.	3	May 1, 1916	2,135	6,405
19	Columbia River Packers' Assn.	3	do	14,154	42,462
20	Stuart Davis	3	do	675	2,025

*Revoked Dec. 10, 1907.

No.		Term (Years)	From	Annual Rental	Total Received
21	Sanborn-Cutting Co.	3	May 1, 1919	4,153	12,459
22	W. E. Tallant	3	do	5,000	15,000
23	Columbia R. Packers' Assn.	3	do	9,256	27,768
24	Bankers' Discount Corp.	3	May 1, 1922	1,149	3,447
25	Sanborn-Cutting Co.	3	do	14,010	42,030
26	Columbia R. Packers' Assn.	3	do	6,680	20,040
27	Barbey Packing Co.	3	do	5,444	16,332
28	do	3	do	6,789	20,367
29	do	3	May 1, 1925	46,000	46,000
30	do		May 1, 1925 to May 1, 1930	46,000	"

Thereupon counsel for the government offered, and there was received in evidence, lease executed by the Secretary of War, as lessor, on March 27th, 1930, and by Barbey Packing Company and Columbia River Packers' Association, as lessees, on April 21, 1930, to which counsel for the defendants objected that the same was incompetent and immaterial to any issue in the case. The objection was overruled and the lease admitted and marked Exhibit 3.

The material provisions of said lease are:

(a) That the Secretary of War leases to the lessees above named pursuant to the Act of Congress approved July 28, 1892 (27 Stat. 321), for a rental of $37,175.00 per annum, for a period of five years beginning May 1, 1930, land on the south side of Sand Island, described as:

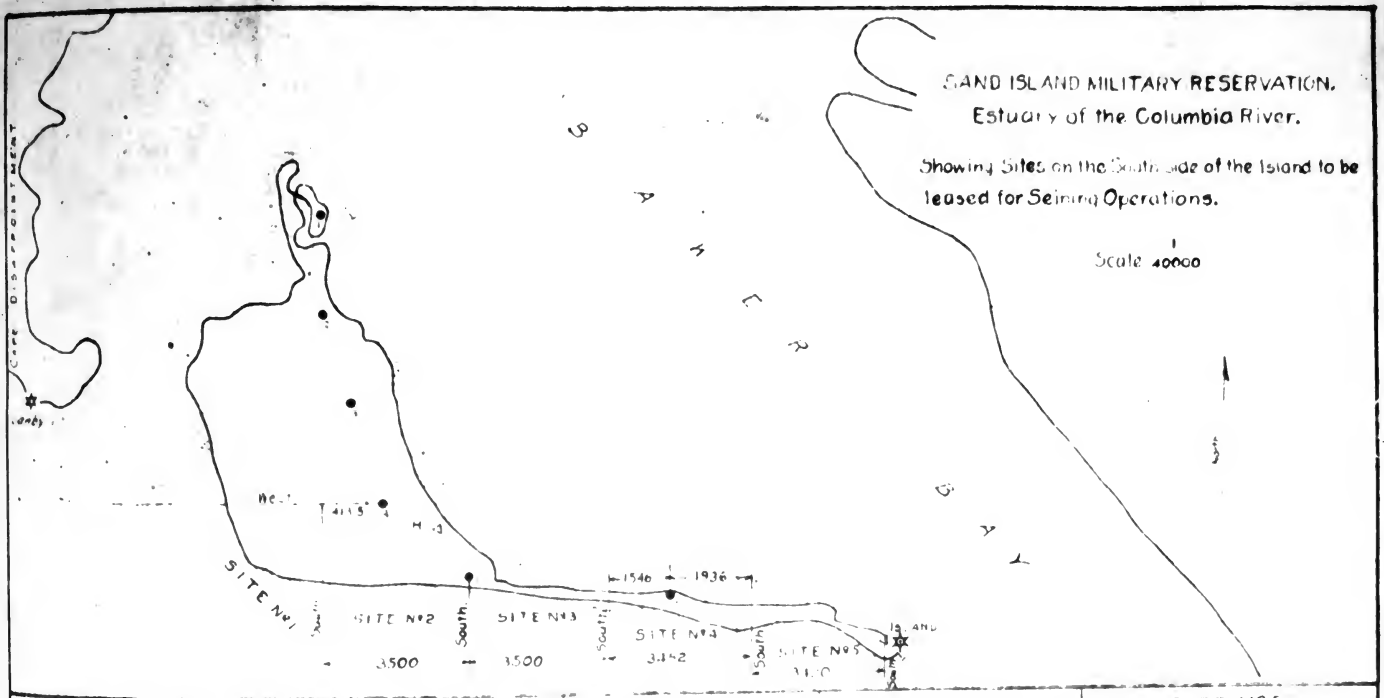
"All of that certain premises on the south shore of Sand Island, together with rights, easements and appurtenances thereunto belonging, known as Sites Nos. 1, 2, 3, 4 and 5, the northernmost boundary being marked by a line running due west from U. S. Monument No. 4 to the intersection with the low water line; the easterly boundary is marked by a line running due south through Station "Island" to low water near the east end of Sand Island. Length of shore line approximately 18000 feet, all as [104] shown and described on the attached map which is made a part hereof;".

(b) That said property was leased for seining purposes only.

(c) That the lease was subject to revocation at the will of the Secretary of War and the uses and occupation of the premises were subject to such rules and regulations as the Commanding Officer at Fort Stevens, Oregon, should from time to time prescribe.

(d) That the rights granted were subject and subordinate to whatever rights, if any, certain Indian tribes had by virtue of the treaties of July 1, 1855 and January 25, 1856, ratified by the United States Senate in 1859.

Attached to said lease was a map or diagram of which the following is a copy: [105]



SITE No 1

The South boundary is marked by a line drawn due West from U.S. Monument No 4 to the intersection with the low water line. The East boundary is marked by a line due South from a point 1413.5 feet due West of U.S. Monument No 4 to the intersection with low water line. The length of low water shore line available is approximately 4000 feet.

SITE No 2

The West boundary corresponds with the East boundary of Site No 1. East boundary is marked by a line due South from U.S. Monument No 5 to low water line. Length of shore line approximately 3500 feet.

SITE No 3

The West boundary corresponds with the East boundary of Site No 2. East boundary is marked by a line due South to low water from a point 1546 feet due West of U.S. Monument No 7. Length of shore line approximately 3500 feet.

SITE No 4

The West boundary corresponds with the East boundary of Site No 3. East boundary is marked by a line due South to low water from a point 1936 feet East of U.S. Monument No 7. (established 1911) Length of shore line approximately 3500 feet.

SITE No 5

The West boundary corresponds with the East boundary of Site No 4. East boundary is marked by a line due South, through station ISLAND to low water near East end of Sand Island. Length of shore line approximately 3500 feet.

U.S. ENGINEER OFFICE
PORTLAND, OREGON

Maps etc 51[10]

Thereupon Exhibit 4 was marked for identification, purporting to be a notice or call of the United States for bids on Sand Island for 1934. Said exhibit was not offered or received in evidence.

It was thereupon stipulated between counsel for plaintiff and for defendants:

That the original complaint in this suit was filed August 15, 1934;

That fishing operations under the lease admitted in evidence and marked Exhibit 3, supra, were carried on until the 25th of August, 1931, and at no time thereafter;

That, in 1931, for some time prior thereto and at all times thereafter, under the laws of the State of Oregon regulating fishing on the Columbia River and in other waters of the State, fishing operations may be carried on from May 1st to August 25, and from September 10th of each year to March 1 of the succeeding year and that the intervals between the periods stated are what are called "closed seasons" and fishing operations may not lawfully be carried on. The closed seasons are March 1st to May 1st and from August 25th to September 10th of each year. [108]

JOHN H. LEWIS

a witness for complainant, testified:

I am a civil engineer; for a number of years I was with the U. S. Reclamation Service and for 14 years State Engineer of the state of Oregon,

(Testimony of John H. Lewis)

since which time I have been in private practice. I became familiar with Sand Island and adjacent territory in 1908 while acting as State Engineer. I cooperated with the Attorney General in the suit between Oregon and Washington involving the boundary line in the vicinity of this property; later there was a special congressional committee investigating this boundary and I represented the State of Oregon at that hearing, making a number of maps and presenting considerable testimony. I prepared the maps and the particular map adopted by the Supreme Court of the United States in fixing the boundary and I did engineering in this connection. I did this after assembling all available maps of the area from the earliest ones prepared by the United States and interpreted them for the Court, showing the changes in the channel at that time and how the early boundary line moved to the North as Sand Island moved to the North.

Taking government's exhibit 1, I describe the movement of Sand Island from the point of its original location from about 1864 to 1905.

Commencing with the map of 1870 compiled by the Army Engineers as to the location of Sand Island for the years of 1839, 1842, 1852, 1860, 1876, 1878, this composite map shows the constant shifting of the island toward the northward with the island growing larger. On the map of 1905, which shows little change in the general outline of the island, the portion to the west grows westerly for a

(Testimony of John H. Lewis)

while, then it was cut away and moved to the East, and then it will grow westerly again. The 1907 map shows a southerly portion growing westerly and the 1908 map shows the high water line growing westerly as well as the low water line. The same is true [109] on the 1909 map. From 1910 to 1915 conditions were much the same except the 1915 map shows a narrow projection on the southerly tip extending to the West, and beyond these and opposite Peacock Spit are other small sands beginning to show up. On the 1912 map there is no evidence of Peacock Spit but on the 1914 map it was quite prominent. On the 1916 map the projection at the south-westerly part of Sand Island is growing larger. On the 1917 map there appears for the first time a considerable area of sand south of Peacock Spit and west between Sand Island and the north jetty. The 1918 map shows a long narrow spit between Sand Island and Peacock Spit which has disappeared on the 1919 map and Sand Island, with adjoining sands, is becoming larger, and Peacock Spit at the same time is growing very much larger and extending to the eastward. On the 1920 map much of the sand at the southerly portion of Sand Island has washed away with Peacock Spit growing to the eastward. On the 1921 and 1922 maps we have two sands appearing, one at the south of

(Testimony of John H. Lewis)

Sand Island and one at the south and east end of Peacock Spit which were washed away on the 1923 map with no evidence of them on the 1924 map, on which map Peacock Spit has grown still further to the East. On the 1925 map Peacock Spit for the first time has reached an elevation above the highest high water shown by the solid line on the map between the words "Peacock Spit". On the 1926 map is a considerable area of sand below the high water on Sand Island and at the East end of Peacock Spit, which body grows considerably larger on the 1927 map with a small adjoining area. These two islands on the 1928 map have been very much reduced in area with another small body to the northwestward. On the 1929 map Peacock Spit has broken into many different sands. Only two extend above high water and the deepest channel is along close to Sand Island. In 1930 there is a tendency to consolidate the various sands, leaving two channels through the same, one along the westerly edge of Sand Island and the other cutting through close [110] to Cape Disappointment. On the 1931 map the westerly channel close to Cape Disappointment has become larger and the channel next to Sand Island to shoal and become narrow. In 1932 the same tendency continues, the westerly channel next to Cape Disappointment becoming wider and shorter and the channel next to Sand Island more narrow and apparently shoaling. In 1933 the westerly channel has moved slightly to the east and upper end of the channel next to Sand

(Testimony of John H. Lewis)

Island has been entirely closed by sand but is open to the south near the westerly dike then under construction. The 1934 map shows the main north channel has moved a little more to the East and that the channel next to Sand Island is still closed at the northerly end It is now narrow and opens into a lake at the southwesterly side of Sand Island. While I made a survey of the sands for the State Land Board for the state of Oregon, I never made any survey on any part of Sand Island.

The north ships channel referred to in the decision of the Supreme Court in the case of Washington vs. Oregon is the channel around Sand Island through Bakers Bay. Beginning with the 1908 map this channel and the changes in it may be traced as follows:

On the 1908 map the depth of this channel is not marked but it was shallow. On the 1909 map the entrance to the north channel is much narrower which continues on the 1910 and 1911 maps. It was about the same on the 1912 map with Peacock Spit growing out on the 1913 map. The channel is shown narrower with two sands appearing at the entrance of the channel. The same condition is shown on the 1914 map and 1915, 1916 and 1917 maps conditions were substantially the same with considerable body of sand appearing for the first time south of Peacock Spit and some of it blocking the entrance to this channel. On the 1918 map the channel is narrow and somewhat obstructed, whereas the 1919 map shows a well-defined channel of considerable width

(Testimony of John H. Lewis)

entering Bakers Bay. In 1920 and 1921 there are some sands on each map showing up near the [111] entrance of the north ship channel but not much change in 1922. In 1923 the north ship channel approaches the edge of Sand Island quite closely but is of considerable width. In 1924 the southerly end of the north ships channel becomes narrower and the upper end is blocked somewhat by two large sands which appear on this map. In 1925, 1926, 1927 and 1928 it is approximately the same. On the 1928 map I wish to point out the location written on this map, the words "North Bend", with an arrow leading to a spot on the southerly and westerly side of Peacock Spit, which designates the wreck of the ship "North Bend". On the next map I do not find this wrecked vessel but it is my understanding this vessel, during the winter time, was driven through by the heavy storms which completely broke up Peacock Spit. I find many other channels on the 1929 map besides what is purported to be the largest channel claimed to have been opened by the vessel. These other channels, while perhaps not as wide, were developed by this storm which completely wrecked Peacock Spit at that time, driving some of the sands a little closer to Sand Island. The 1930 map shows a beginning of the tendency to consolidate the area of sands, the north ships channel still being divided into two parts, one going south along the edge of Sand Island and another going almost directly west close to Cape Disappointment. Some of

(Testimony of John H. Lewis)
the sands at the southeasterly portion of this area are not completely consolidated. The 1931 map shows the north ship channel close to Cape Disapointment to be considerably wider and all of the sands have been consolidated and the channel next to Sand Island is growing narrower. The 1932 map shows that the main channel into Bakers Bay, the north ships channel, goes close to Cape Disappointment, and that the channel next to Sand Island is becoming very much narrower and diminishing in importance. The 1933 map shows a well defined north ships channel with soundings upon this map, the other channel close to and adjoining Sand Island being entirely closed at the north end. The 1934 map shows practically [112] with the narrow ships channel moving slightly to the east.

The heavy lines surrounding the words "Sand Island" indicate the highest high tide line where it intersects the edge of the island. On this map there is no part of Peacock Spit shown to be above the highest high tide. This channel around Sand Island is not the main channel of the Columbia River although in the early days it was but at a time when the island was considerably further to the south than at present. The south channel of the Columbia River is navigable for very large ocean going vessels and the north channel for very much smaller vessels. The north channel is not the main channel at the present time but was in the early days when Sand Island was considerably further south than its present location.

(Testimony of John H. Lewis)

Examining government exhibit 5 for identification. I walked over Sand Island last Sunday and observed the conditions of the ground between what is marked "low water 1935" and "high water 1935" west of the westerly jetty sticking out as a black line on the southeasterly edge of Sand Island, and made a general inspection on the ground, and in my opinion this exhibit correctly shows the conditions as I observed them. I recognize government exhibit 6 as the blue print from a tracing I prepared yesterday which shows the general outline of the mainland of Washington and Oregon in the vicinity of Sand Island with Sand Island shown in heavy, solid lines for the year 1894. This map was prepared by tracing from the maps heretofore introduced as government exhibit 1 for the years noted on this map and is intended to show the gradual and continuous shifting of Sand Island to the westward from 1894 to about 1920 with a gradual building up of the high water line of the island during all this period from 1894 to 1920. The channel marked "North Ship Channel 1934" was traced from the 1934 United States Army Engineers map and is intended to show that the 1934 channel comes to about the westerly edge of the meander line. This blue print was introduced and marked government's exhibit 6 but on account of its size it is impractical to insert it or a copy of it into this record. I intended this exhibit to determine whether sands from the west will build up and grow to the east or build up to the

(Testimony of John H. Lewis)

west and to show that as some of the sands are washed away they will be built [113] up by additional sands being deposited when brought down the river during floods and not in general by any sands being washed upstream by the river, although this might occur during heavy, violent storms for short periods.

Cross-Examination

My map, exhibit 6, shows conditions for the years 1894-5 and 1915 and 1920. I selected the years to show the westerly movement of the high water line of Sand Island.

The witness was then asked:

Q. Why didn't you show the easterly movement? Why did you quit just before that began?

A. The easterly edge of Sand Island—

Q. No, I say the easterly movement of the west edge of Sand Island. Why did you quit the maps that would have shown that, why didn't you put that in too?

A. It is apparent from the modern, late maps.

* * * * * * *

Q. I will ask you this question, Mr. Lewis. Isn't it a fact that the very next map in the series which the Government has introduced as Government's Exhibit 1, will show the opposite action from what you show on the other, and the further maps after that?

A. That was explained by me—

(Testimony of John H. Lewis)

Q. I am not asking for an explanation or an argument. I am just asking isn't that a fact?

A. Beginning with about 1920 this portion of the land, the westerly movement, was washed away by the north channel.

Q. Well, is it or is it not a fact that beginning on maps immediately following the ones you used, this so-called westerly movement ceased, and the west end of Sand Island washed away and receded towards the east?

A. Yes, that is correct.

Q. Why didn't you put that on the map?

A. Because it is apparent from—clearly apparent from the maps; because the movement is not so gradual as in those years, and is easily discernible by looking at those other maps."

I believe that from 1894 to 1905 the westerly movement was 600 to 700 feet, from 1905 to 1915 possibly 400 feet; between 1915 [114] and 1920 just a few hundred feet, making a total, I would judge looking at the map, of 2400 feet or something like that. From 1920 to 1934 the point directly opposite the easterly projection of Cape Disappointment washed away about 500 feet, the recession being very much less than the westerly movement. I consider the place I selected on the west shore of Sand Island is fairly typical of the recession on the entire west shore. The projection on the southwest side of Sand Island shown on the 1928 map appears as scoured off on the 1920 map. The figures at the top and bottom of

(Testimony of John H. Lewis)

the map and on the sides of the map are longitude lines and are on all the maps. If a person would lay a ruler across 124 to the same place on the bottom of the map it would show where that line crosses Sand Island and make an exact comparison possible. It would be easy to lay these lines across a given point on all the maps from which a person could testify accurately as to the movement of the island on the diagonal portion which has been under discussion. On the 1931 map no dikes are shown extending from Sand Island into the Columbia River. We have a wide north channel to the west and a branch thereof to the East close to and adjoining Sand Island. On the 1932 map neither channel shows any soundings, indicating that the engineers felt boats could go in either route.

The witness was then asked:

Q. Upon what authority do you base that statement?

A. Well, it is just my guess, I assume that because the depths are not here.

Q. Don't you think that it would be as safe to assume that it had shoaled to a point where they didn't want boats to assume it was navigable; shoal water?

A. No, because both 1931 and 1932 maps of the government now show a high water line and also a low water line of the various sands and which indicate the channels. The channels then are shown by these sands shown upon the

(Testimony of John H. Lewis)

maps—the channels are marked by these sands, and if there was any preferences I presume the government would indicate on the map.

Q. Don't they show that on every map, the high water line and the low water line?

A. Yes, they do, they indicate that. [115]

Q. There is one then for 1932 and 1932?

A. Except the 1931 map, they show the depth of one channel and not in the other, and on the 1932 map they don't show the depth of either channel. And on the 1933 map they show the depth in the west—most westerly of these divided channels, and at that time the easterly branch of the north channel is completely closed up at the northerly end so it would be useless to put any depths in that channel, because there is no channel.

Q. That is, after these dikes have been in there for a full year or more.

A. There were two channels in 1932, when two dikes were in place. On the 1933 map were still two dikes in place, and in the other two under construction there were beginning to have a slight shoaling or closing of the upper end of the easterly channel.

Q. That was the one chartered in 1931?

A. Yes."

The maps show that at Bakers Bay north of Sand Island there is a meeting place where the tides come in from around the west end of Sand Island and

(Testimony of John H. Lewis)
meet the flow of the river from the east end creating dead water.

The earliest date the name Peacock Spit appears on any map which I have studied is the map of 1880. That map indicated a body of sands in the mouth of the Columbia River close to Cape Disappointment and further out toward the ocean from the present area that is known as Peacock Spit.

The following questions were asked and answers given:

Q. It is very much further out. And that position on the maps indicate that these sands known as Peacock Spit moved inward. Is that true?

A. Judging from the map, I would say that Peacock Spit grew inward instead of moved inward.

Q. Grew inward?

A. Yes, for a time, and then later on almost entirely disappeared.

Q. What year do you refer to?

A. On the 1901 map, I would like to change that; it appears in some years on the map, the words "Peacock Spit"—Peacock Spit is not shown by dots indicating sands but by the printed words, and it would appear that Peacock Spit grew upstream for a time and also downstream for a time, enlarging in nearly every direction. [116]

(Testimony of John H. Lewis)

The 1906 map does not show that Peacock Spit was sounded but the word Peacock Spit is on the map just below the word "breakers" indicating shallow water. The map of 1852 is the first map that I recall having examined in connection with the Sand Island litigation. The earlier maps, I believe, were made by the British Navy. However, my interest in these earlier maps was not to get the very earliest but the best map that was published by the United States just prior to the admission of Oregon which I thought would have been the map used in describing the boundary line of Oregon.

The 1880 map shows a very large area marked "Middle Sands" which are connected to Sand Island and not to Cape Disappointment. The north channel coming out to the north of Middle Sands. The 1880 map also shows Peacock Spit to be south and entirely west of Cape Disappointment about four miles westerly from the present area of Peacock Spit on the 1934 map. After discussing the channel south of Middle Sands and the channel north of Sand Island, the witness was asked:

> Q. Now, I want you to listen to my question. I didn't ask about that channel at all. I asked which was being used, the channel north of Middle Sands or the channel north of Middle Sands and around north of Sand Island?
>
> A. I can only answer that question by judgment from the depth of water and width of the channels on the map of 1800 and judging from

(Testimony of John H. Lewis)

those depths and widths I would say the south channel at that time was the most important, but the north channel was straighter and may have been used at that time in preference to the crooked south channel.

Q. What do you mean by north channel?

A. It is the channel north of Middle Sands and going north of Sand Island.

Q. Have you read the engineers' report of 1880?

A. No, sir.

Q. So you don't know that this channel right across here was actually in use, the one right through between the Middle Sands and Sand Island?

Objection was made and the following question was asked. [117]

Q. Do you know whether that is true or not, whether that was the channel in use all along, the one north of Sand Island?

A. Could easily be the case for shallow vessels, but for deeper vessels would have to go either south or north because at that point you described is considerable less depth than in the adjoining north channel and south channel."

I examined this map to determine whether or not the channel in Bakers Bay was not shallower than the channel north of Middle Sands and south of Sand Island and find the shallowest one of each

(Testimony of John H. Lewis)

is fourteen feet east of Sand Island and fifteen feet between Middle Sands and Sand Island.

The witness was then asked:

Q. And yet you testified to the court that the Middle Sands were joined onto Sand Island, according to that map?

A. Yes, they are.

Q. And Sand Island, then, by the same token, is joined onto the north shore of the Columbia River in Washington. Is that right?

A. Sand Island is separated from the north shore by a channel of the depth which I named.

Q. And the Middle Sands are separated from Sand Island by a deeper channel. Is that right?

A. According to this map the Middle Sands are connected to Sand Island by a shoal which has a depth over the top of fifteen feet.

Q. And Sand Island is connected with the Washington shore by a shoal that has a depth of fourteen feet?

A. If you care to put it that way, yes.

Q. Why now are you telling the court that there is a shorter straighter and deeper channel between the Middle Sands and Sand Island than there is between Sand Island and the Washington shore?

A. For vessels of that depth, that is correct.

On the map of 1880 Peacock Spit is shown as a separate entity from Sand Island, cut off but what I term the north ship's channel. The channel be-

(Testimony of John H. Lewis)

tween Peacock Spit and Sand Island is much deeper than is the same channel at the east end of Sand Island or the channel between the Middle Sands and Sand Island. This map also shows Peacock Spit to be located against Cape Disappointment. On my [118] visit to Sand Island on Sunday preceding the giving of my testimony I was from two to three hours on and in the vicinity of Sand Island. Previous to this visit I was there in 1908 during the litigation between Oregon and Washington at which time I spent a few hours. I was there on a fishing trip when I was stranded and learned something about the shoals around the edge of Sand Island. This was about 1918. These were about all the times I was there. There are six or seven government monuments but I was unable to find any of them. I have never claimed that the body of sand connected with Cape Disappointment was a part of Sand Island. The lake I spoke of on direct examination along the west end of Sand Island was occasioned by the closing of the northern end of this channel. The point on the 1932 map which shows the channel narrower as compared with Sand Island is the very point where the channel is shown closed on the 1933 map. The first dikes along the south side of Sand Island were some 18,000 feet from the south entrance to this channel and were constructed in 1932 and the other two dikes which are nearer to the mouth of the channel were started in 1933.

(Testimony of John H. Lewis)

Interrogated with respect to his direct testimony that he prepared the maps used by the U. S. Supreme Court in deciding the boundary between Oregon and Washington, the witness testified:

Q. Mr. Lewis, you said that you prepared the map that the United States Supreme Court used in deciding the boundary line between Oregon and Washington. Is that what you testified?

A. Yes.

Q. Well, I hand you Volume 211, U. S. Supreme Court Reports, and show you pages 132 and the succeeding pages, and ask you which one of those you prepared.

A. The map on Page—the colored map opposite Page 132, is one of the Army Engineers maps, but Chart A, 1851, and the colorings shown here, is the same as the coloring and legend on the map which I prepared and submitted in that case. There was no change in the map except the coloring to indicate the depth of the water and the darker coloring being land, in order to emphasize the north channel, the south channel, and the middle channel; and the map of Page 132 is similiar to a map which I prepared to show the shifting islands, and I believe at least similar to the ones which I prepared. [119]

Q. Now the map opposite page 132 is credited to "Mouth of Columbia River from a preliminary survey under the direction of A. D. Bach,

(Testimony of John H. Lewis)

Superintendent of the survey of the coast of the United States by the hydographic party under the command of W. D. McArthur, Lt. U. S. N., and Asst. U. S. Coast Survey W. A. Bartlett, Ltd. U. S. N., Assistant. Published in 1881." Now that is the legend on the map.

A. Yes, sir. And my desire at that time was to have—place on here nothing new except the coloring to emphasize the channel so that the court would know was based upon official survey of that particular time and date, the coloring merely being put on to emphasize the channel.

Q. Then what you did was to take their map and color it?

A. Yes.

Q. What was it you said you had to do with the other map?

A. I recall having prepared a map showing the shifting of Sand Island to the northward, and this other map looks like it might have been traced, or may have been the one which I prepared. I don't just recall whether that is traced from mine, or whether it is the same thing.

Q. Do you know Mr. George Hegardt?

A. Yes.

Q. Who was he?

A. He was for a time in charge of the docks of the city of Portland.

(Testimony of John H. Lewis)

Q. What was he at the time this government case, this case between Oregon and Washington?

A. He was one of the engineers employed by the State of Washington?

Q. And what preliminary experience has he had—did he have to qualify him if he had any special qualifications for making the maps in connection with the controversy then before the court?

A. I feel quite sure he was a qualified engineer: I don't just recall his particular qualifications.

Q. Now I call your attention to Page 210 of Volume 214, United States Supreme Court Reports, which is the decision of the Supreme Court on rehearing of this case, in which it is said "As to the channel south of Desdemona Sands, shown on Washington Exhibit 'H' there never has been a time from 1859 down to the present day, when that channel has not been the main channel of the river at that point, the channel which commerce has followed. Both Jussen and Hegardt, accomplished engineers, prepared test maps which were accurate reproductions of the several maps issued by the government, commencing with that of 1851," etc. Was that Mr. George Hegardt referred to there?

A. I presume it was.

Q. And you say he was working for the State of Washington? [120]

A. Yes.

(Testimony of John H. Lewis)

Q. He had been a government engineer, though, for years down there, hadn't he?

A. For some time, I think.

Q. Now I want to show you one of these maps in here, Mr. Lewis. I wish you would look at the map for 1870 being a part of Exhibit 1, and tell the court if that isn't a government map, which shows the change in Sand Island from the government maps and for the period covered exactly like the map on page 132, volume 211, United States Supreme Court Reports?

A. It is somewhat similar, although not exactly the same.

Q. Where it shows for the same years, it is identical?

A. Of course.

Q. Yes.

A. Yes it is.

Q. So the government had maps of their own?

A. Yes.

Q. Showing these various locations of Sand Island, and they are identical for the years covered with what is shown on Supreme Court Report?

A. Yes.

Q. Now are you prepared to say you prepared this map yourself?

A. Now, I am not; I prepared a map somewhat similar to that which was introduced in testimony." **[121]**

(Testimony of John H. Lewis)

On Redirect Examination,

the witness testified:

The channel between Sand Island and Peacock Spit adjoining Sand Island on the southwesterly side thereof as shown on the 1929 map is wider and deeper than as shown on the 1930 map; and on the 1930 map is wider and deeper than as shown on the 1931 map. And

"Q. And then in 1932 what do you note with reference to that channel as compared with its condition in 1931?

A. The same tendency for shoaling of this channel which existed in the two previous years 1930—or 1929, 1930, and 1931, seems to continue in the 1932 map, and would be no more than you would expect without any jetties having been constructed.

Q. What is the fact as to whether or not the filling up of the channel, or the change in the channel has been gradually and in about the same proportion from year to year from 1929 on down to 1932?

A. Yes, sir. That is the basis for my testimony heretofore."

The same tendency continues on the 1933 map although on this map there are some jetties and therefore it is impossible to say to what extent the jetties had any influence on the shoaling of this channel. In 1931 the government map shows depths

(Testimony of John H. Lewis)

in the channel southwesterly and adjoining Sand Island but in the 1932 map no depths are shown. But the width, however, at the upper end of the channel adjacent to Sand Island is very much less on the 1932 map than on the 1931. The sand bar across the channel from the southwesterly part of Sand Island is somewhat smaller on the 1931 map than on the 1932 map. The general outline of the sand bar on the 1933 map seems to be slightly smaller although it has extended up stream a little farther than on the 1932 map. The sands of which I am speaking are somewhat smaller on the 1934 map than on the 1933 map due to a tendency of the North Ship Channel to move easterly in 1934 as compared with 1933. These sands as shown on the 1934 map are considerably smaller than as shown on the 1930 map.

When I was down at Sand Island last Sunday I observed what has been called a lake situated in the sands below high water and on the southerly and westerly shore of Sand Island. I was there at [122] about low tide. I estimate the lake to be about 3000 feet long. I do not know how deep this lake was. However it had considerable more depth than at the outlet into the main channel. The outlet was about 40 feet wide leading from the lake in a southwesterly direction to connect with the main channel of the river and the water was flowing out at the time we were there.

"Referring now to the map of 1930, I will ask you to compare the size of the sands lying across

(Testimony of John H. Lewis)

what we have called the channel lying immediately south and west—lying along the southerly and westerly shore of Sand Island—the size of the sands as of that date with the size of the sands noted on the map of 1934.

A. The sand bar you mentioned on the 1934 map was very much—is considerably smaller than on the 1930 map, although the shapes are somewhat different and it is impossible from just a visual observation to say the percentage. I would roughly say it was forty per cent smaller, as a rough figure.

Referring to the map of 1880, which is a part of plaintiff's exhibit 1, it will be noted that there is a body of sands on the southerly and westerly shore of Sand Island projecting in a southerly direction. Soundings are indicated on this map and contour lines on the bottom of the river at various depths. There are some soundings on the dotted or sand spit area. There are some soundings on the outer edge of these sands indicating a depth of about 12 feet. These soundings as shown on the 1880 map are about the same location as the sands south and west of Sand Island shown on the 1934 map. I observe that no soundings are noted for this area on the 1934 map and this would indicate that there are sands adjacent to what I assume to be the high water line shown in solid on this map as the boundary of Sand Island. The absence of soundings would not indicate the depth of water as Army Engineers are more

(Testimony of John H. Lewis)

concerned in the depth of a channel and not so much in the depth of a river used for fishing purposes. On the 1928 map there are three little bodies of sand shown on the southwesterly side of Sand Island in the North channel. This map shows Peacock Spit to be a long, narrow body, above high water, with a small adjacent area between high and low water. [123]

Recross Examination

Referring to the 1928 map, what I have referred to as the North Ship Channel is the channel around to the north of Sand Island into Baker's Bay. On this map the engineers have put their soundings right up along Sand Island. That would be the indicated navigable channel. It does not indicate though that it is not just the same at other points.

Witness was asked with regard to the co-ordinant X8S on the maps, and stated they were definite location points. Taking the X nearest to the Southerly end of Peacock Spit on the 1928 map, it is practically at the East edge of Peacock Spit, and on the 1929 map it extends beyond this line Eastward, about 1000 feet, which would bring this extension of Peacock Spit South of Sand Island. The area between high and low water on the Westerly shore of Sand Island is narrow, whereas the area between high and low water on Peacock Spit is broader. The 1931 map shows its channel immediately along the Southwesterly side of Sand Island.

"Q. Now take this point you have been using here, and tell the court to what extent those

(Testimony of John H. Lewis)

sands have built out to the eastward which would make them south of Sand Island and on the Columbia River side of this main ship channel.

A. On the 1931 map the high water portion —the portion of those sands above high water has been entirely washed away and the balance of the sands consolidated, in an area about the same roughly, and perhaps a little bit less than the area shown on the 1930 map.

Q. Will you just measure and tell the court how far it is from the center of these X's up to the easterly point of these sands that have been building out from Peacock Spit?

A. From that X shown on the 1931 map, to the most easterly edge of the sands southwesterly from Sand Island, is approximately five thousand feet as scaled upon this map.

Q. Almost a mile from that given starting point?

A. Yes. [124]

Q. During that period to what extent did the sands build out from Sand Island?

A. A small amount, probably about two hundred and fifty feet as scaled from this map.

Q. It is so small that it is impossible to accurately measure it with the instruments you have, is it, Mr. Lewis?

A. Well, it has apparently increased to some extent.

(Testimony of John H. Lewis)

Q. That is obvious to some extent, but the increase is comparatively negligible?

A. Roughly what I have indicated.

Q. This last map, the last survey made before the construction of any of those dikes out from Sand Island?

A. Yes."

"Mr. Lewis, will you take a ruler and lay it from this point we have been discussing across the next one due east of it, across the next one due east of it, across the margin of Sand Island, and tell the court whether during this period from 1928 to 1932 the west shore of Sand Island opposite a point where these sands are, did not actually recede eastward instead of going westward? That is rather close computing. Did you use these to get your figures?

A. This is the one you ask about?

Q. 1928 to 1931 or 1932, whenever the possible effect of the dikes.

A. In measuring from the most westerly two points you mention to the nearest shore of Sand Island, with the compass, on the 1928 map, and placing the same compass upon the 1929 map, I find practically no change in the west shore of Sand Island. And on the 1930 map, using the same compass, I find practically no change. On the 1931 map I find that the edge of Sand Island has moved probably two hundred feet east; the west shore of Sand Island has moved approximately two hundred feet east.

(Testimony of John H. Lewis)

Q. That is the same time and the same map that you said these sands to the west had moved east about an aggregate during this period, as I remember, of about five thousand feet. *It* that the map?

A. Where it shows that they had extended that far?

Q. Yes.

A. On the 1932 map I find the west shore of Sand Island has moved back to approximately the same point as on the 1928 map.

Q. I only asked you the period of 1928 up to the time when the effect of the dikes would be apparent, if there was any effect.

A. Yes. [125]

Q. 1931 was the last year before the dikes were built?

A. Yes.

Q. 1932 was the first year when the dikes were built?

A. Yes."

Redirect Examination

"Now take your compass and refer to the edge of the island that you have just been mentioning, and note if there was any change in that line after the dikes were built. If there is a change, note what it is.

A. On the 1932 map, which is the first map on which the two dikes appear as having been constructed, the shore of Sand Island measured

(Testimony of John H. Lewis)

from the most westerly of the two points heretofore mentioned, is practically the same distance from this point on the 1934 map, but on the 1933 map it has been built out probably three hundred feet.

Q. In what direction?

A. In a westerly direction, and washed away again in 1934.

Q. And what is the condition in 1934, with respect to that same line that you are defining?

A. Well it is the same as 1932, as heretofore testified.

Q. And compare the 1934 line with that found in 1931 prior to the construction of the dikes?

A. In 1934 the shore line, measuring from the same point, is a little further west, a very trifling distance than on the 19— than on the 1931 map.

Q. Now using the same mark, I will ask you to examine the map as of the year 1928, and note any progress made by the sands on what is termed on the map as "Peacock Spit" towards Sand Island northward?

A. Measuring from the cross near the end of Peacock Spit as shown on the 1928 map, south to the edge of the sands, as shown on that map, and comparing it with the same measurements on the 1929 map, we find them approximately the same."

"Q. Using that mark again as a base, I will ask you to trace the progress of the movement,

(Testimony of John H. Lewis)

if any, of these sands, from 1929 to 1931, the movements of the sands towards Sand Island and in a northerly and easterly direction.

A. In a northerly direction on the 1930 map the southerly boundary line of the sands has moved northward about four hundred feet.

* * *

"A. On the 1931 map we found the southerly boundary line of the sands has moved south again, although not quite as far as on the 1929 map; and on the 1932 map we find such southerly boundary line has moved about six hundred feet northward on the 1932 map. This mark—the date is September, 1932, to be more specific, and on the 1933 [126] map such southerly boundary line has moved southward again several hundred feet, and on the 1934 map it has moved northward again a little further, or about the same point as the 1932 map. Now as to the east and west movement, I think I have testified generally in my former testimony, but I will take the compass now and make exact measurements, beginning —

Q. Unless Mr. Bowerman wants that, I was simply interested in showing the northerly progress of the sands towards Sand Island prior to the construction of the dikes, so you need not mark such calculation unless Mr. Bowerman wishes it.

Mr. BOWERMAN: May I suggest that what you have shown is the southerly extremity of

(Testimony of John H. Lewis)

these sands on the side of the sands away from Sand Island, not away from this point and Sand Island.

Mr. HICKS: I submit for your information that that other calculation was made in my prior examination, to show the gradual progress of these same sands we have been talking about towards the edge of Sand Island in a northerly direction. That has all been covered in the testimony. [127]

H. K. PARKER,

A Witness for the plaintiff, testified:

My home is in Astoria, and I have lived in that vicinity for about forty-five years. My occupation is that of seining foreman. I have been engaged in seining and fishing activities for about thirty-one years. During that period I have gained some familiarity of Sand Island, Peacock Spit and the adjacent premises. I was in the Navy in 1917-18. I have been engaged in fishing operations during the past two or three years. I worked several miles about Sand Island during that time, but have been near the island several times. I have not engaged in fishing on Sand Island since 1929.

I am familiar with the method of fishing known as seine fishing. Drag seines vary in length. Those used on Sand Island most of the time were about 220 fathoms long, six feet to the fathom. A drag

(Testimony of H. K. Parker.)

seine is a web that is hung between a lead line on the bottom and a cork line on the top. The cork line floats and the web is suspended or hung between the lines, fastened on the lines. The nets vary in width. You cut the web to float to the bottom and the top on the surface. When operating one end is fastened to the shore and the net is let out in a semicircle so as to drift with the tide. When the drift is made you pull in with a team, gradually sweep the net in from both ends until you have your fish corralled in a small spot and rolled up on the sand. The free end of the net is taken out into the water on a seining skiff, which is a flat bottom boat about 28 to 32 feet in length and is towed out with a power launch. As the net is brought in and around towards the shore the fish is collected and when rolled up on the sand are handled by hand. This type of operation is [128] carried on on the flood tide on Sand Island. The fish when picked up by hand are placed in some kind of a container and hauled away. Usually on Sand Island they were thrown into a wagon, hauled away with a team and loaded on scows or launches.

I have observed the Sand Island premises during the past two or three years. During that time there have been buildings on Sand Island. There were buildings there last year. I am familiar with the maps. Referring to the 1934 map, there was some piling in approximately that position (indicating) in the lagoon, the bank side. I am now referring to

(Testimony of H. K. Parker.)

a point on the easterly edge of the area circumscribed in red on the sands lying immediately South of Sand Island. I have marked the spot where the pilings were as nearly as I can remember with a red dot, which is more to the south of the letter "l" in the word "Island" than to the letter "a" in the word. Only the piling is left there now. There were two frame buildings there in 1934. I was told they washed out since then, but I didn't see them go out. There was a heavy storm last winter but I do not know the extent of the storm. There were no other constructions there in the last two or three years that I know of. There are old buildings still there back of the island on the north side of Sand Island, which is a long way from the point I have just mentioned. The buildings, the location of which I marked on the map, were used in 1934. They were a barn and messhouse, I think. I did not observe any fishing on Sand Island in 1934, but I did in front of Sand Island, but not on the island, when they were fishing. [129]

"Q. When I said Sand Island I meant the sands immediately South, same being the disputed premises.

A. Yes, I saw them.

Q. And over what period of time did you observe fishing activities on these particular sands in the vicinity of this red dot that you have pointed out, and immediately south of the letter "l" and extending on westerly, over last year?

(Testimony of H. K. Parker.)

A. Not over an hour.

Q. You just saw them on one occasion?

A. That is all."

I am familiar in a way with the premises known as Peacock Spit and with the location of what is termed the North ship channel, I know the channel as it changes.

I am familiar with the tides and activities of the stream or estuary of the Columbia river. Frequently there are heavy storms down there. Just how often it is pretty hard to say. In lots of winters we have continuous blows, sometimes a week at a time we have the storm signals up. The tides often go over the scale, I think some winter tides are eleven feet. I have seen tides two and three feet over the scale. There is always a run of winter high tides. Last October we started with the first heavy storm. It was somewhere around October 30, if I remember correctly. We had several hard blows, continuing right along until Spring. We have breakers that break upon the shores of Sand Island and any sands that might be lying in that vicinity. I don't know just what kind of breakers they are, I should judge they go from six to eight feet. They are smaller than ocean breakers. I have known them to go as high as six to eight feet. It is not unusual for breakers to reach an altitude of six or eight feet.

It is a hard thing to say how frequently that vicinity is visited by heavy storms. We don't keep

(Testimony of H. K. Parker.)

track of those [130] things. I know of my own knowledge that before the first of the year we had four hard blows, but after that I didn't pay much attention because I wasn't on the river, but there was at least four hard ones before the first. I haven't been on the lower river much since 1929.

I can't say whether the area lying west of the channel which you pointed out to me, and which angles but is adjacent to Cape Disappointment, in the summer months of 1934 was covered with water. The waves or breakers against the shores of Sand Island and the sands adjacent thereto carry sand. A hard blow will always change the contour. These changes may be perceptible over night, and at other times not so much so. The change might be either a building up or carrying away. In the course of a week, or on some occasions in the course of a day, the contour of Sand Island, and the contour of the fringes of sand which border the island, and of spits, may change to the extent of hundreds of feet. Maybe one blow will make the changes, make a new island or build another one. When I say an island I mean a flat. I am talking about flats. If you have a southwest blow your swell will come in this way (indicating). It will go with the wind, it would approach from the ocean.

Cross Examination of Mr. Parker.

The last time I fished in the lower waters of the Columbia was in 1929. At that time I fished in the

(Testimony of H. K. Parker.)

Fall on site No. 2 on Sand Island, with Mr. Smith. It was a drag seine operation. Mr. Smith was foreman for Mr. Barbey. At that time I remember the Columbia River Packers Association was carrying on drag seine fishing across on Peacock Spit to the west and a little to the north. The drag seine operations [131] of the Columbia River Packers Association at that time were over on the sands somewhat to the west of Site No. 2. Referring to the 1929 map, the fishing operations of the Columbia River Packers Association were over towards the area where the word "spit" is written surrounded by a white circle, and the operations were carried on a little to the east of the white circle. At that time the Columbia River Packers Association had structures, such as a dock, messhouse, barn, etc., on these sands, to house the men and horses. Boats operated by Columbia River Packers Association went to these fishing operations to carry the fish over to the packing house at Astoria. These structures, or particularly the dock, projected over these sands into the channel betwen these sands and Sand Island, and the boats coming from Astoria to carry supplies in and fish out went down the channel between Sand Island and these sands. The channel was rather close to the shore line of Sand Island in 1929. I was down there in 1930. Have been down there every year, but I couldn't testify anything. In 1929 and prior years there were a number of small craft, such as fish carriers, etc., that ran from the Columbia river into what is called the Bakers Bay area up to Il-

(Testimony of H. K. Parker.)

waco. I don't think they always took the channel between these sands and Sand Island. I think in calm weather—in fact, I am sure, they went through here (indicating.) I don't know anything about the ship called the North Bend. There have been numerous times, I won't state the dates, I don't know the dates, but there have been other channels through before the North Bend was over there. I can't say whether there was any channel through the spit for a period or ten or eleven years before the North Bend cut through [132]

The fishing operations I saw in 1934 were carried on from down here to here, the length of the beach (indicating). That would be south of the lagoon, and the buildings used in connection with these fishing operations were where I have marked with a spot, and that was south of the lagoon. It was across the lagoon. You would have to look across the lagoon to the north and east to see the high water line on Sand Island. The structures used in these fishing operations projected out into the lagoon. There was a bunk house, a messhouse, I should judge, and the dock projected out into the lagoon. The boats reached the dock through the channel between the sands upon which these structures stood and Sand Island, and came into the channel a little to the west of the most westerly dike and then proceeded up to the dock.

"Q. And the dock was built into the land—the dock was built so that it projected eastward and northward into the water?

A. A little north.

(Testimony of H. K. Parker.)

Q. And the dock didn't reach what you call high water mark on Sand Island?

A. No.

Q. In other words, the boats came in that channel along the south shore of Sand Island and tied up to the dock?

A. Yes.

Q. And was plenty of water between that and Sand Island proper, for the dock—the boats to tie up to the dock?

A. Yes.

Q. Load and go out through the same channel?

A. Yes."

These boats were what is called fishing tenders, about sixty feet long, with a beam of about fifteen feet and draft when loaded of 7½. I was only down there once in 1934, and only [133] observed these fishing operations for about an hour, which was in the month of August.

Redirect Examination of Mr. Parker

The pilings built on the spit in 1934-'32, are still there. I could locate them, but only in a general way.

Referring to the map of 1932, I would locate them about here (indicating). I have marked with a small cross a point immediately south of the easterly tip of Cape Disappointment and between the sands just south of Sand Island and such sands as are projecting from Cape Disappointment. That is as near as I can put there by guess, and it is just my best guess. [134]

LARS BJELLAND,

A witness for plaintiff, testified:

I am the officer in charge of the Coast Guard stationed at Hammond, Oregon. I have occupied that position for thirteen years at two different times. The last time I have been there since June 11, 1929. My general duties are to protect life and property. I am familiar with Sand Island and with the sands adjacent thereto, and have had occasion to observe fishing activities conducted on the sands and on the island over the last three years. These fishing operations were carried on with gill nets and drag seines. I observed drag seine operations in 1932 below the lower dike and in the general vicinity of the area circumscribed in red on the 1934 map. I can't say exactly how long these operations continued, but I should say from the latter part of June until August. I observed drag seine operations on the same premises in 1933 and again in 1934. The drag seine operations I have referred to were carried on in 1932, 1933 and 1934, upon the sands that I have indicated.

I have observed the waves, tides and currents that occur in the estuary of the Columbia river and in the vicinity of these sands and of the island. When we have a heavy storm of course it causes the sea to increase and on flood tides it will increase the sea.

"Q. Describe to the court the character of the storms and tides that you have noticed there.

(Testimony of Lars Bjelland.)

A. Well, if we have a heavy storm of course it causes the sea to increase, and on flood tide it will increase the sea; it will go over the lower part of the island and it also will carry—when it gets rough will stir up the sand and carry sand along as it comes in—in or out—on the flood tides will mostly carry sand in, and on the ebb take it more back again as she goes out; but on the flood, as I say, she will come in and carry sand also with it." [135]

Every tide covers them. I am speaking of those projecting from Cape Disappointment.

Referring to the sands abutting on Sand Island and those immediately east of the channel running between the sands I have mentioned and sands abutting on Sand Island, during the summer months, when the weather is nice they are not altogether covered, but at times during storms will carry on and in through this lagoon. But during the summer months she will not go clean over to the bank.

"Q. What is the fact as to whether or not during storms even of mild extent the sands abutting from Sand Island to the south are covered practically to the point of the main land?

Mr. CLARK: You are talking now about sands south of the lagoon.

Q. South of the lagoon and abutting from Sand Island, yes.

(Testimony of Lars Bjelland.)

A. The west end here. Really here is too high on the west end here. She covers—goes across here on the outside.

Q. You are referring to—

A. West of the Lagoon.

Q. To the area directly south from the westerly edge of the main land of Sand Island?

A. Yes."

Referring to the sands lying to the south of Sand Island, when a mild storm is in progress I should say that about half of these sands would be covered. I am pointing to the sands which are almost directly south of Sand Island.

During storms of greater extent she would come across here into this lagoon. During the winter months, why, she would break right across here. I would not say here, but from here on and up to there she covers (Indicating).

During a fairly severe storm nearly all of the sands immediately south of Sand Island would be covered, with the [136] exception of the west end.

I have not had occasion to measure the tides which occur there. They would, of course, be taken from the tide tables. I have observed the breakers on Sand Island. They vary in height according to the storm and the direction of the wind. If the wind is from the west they are worse, because that would be straight in from the bar and they would hit the west end, or the southwest end of the island. If the wind was from the southeast the south jetty would,

(Testimony of Lars Bjelland.)

of course, protect some. There are breakers that come in directly from the bar and approach and hit the edge of the island, and the sands south of the mainland, or the low side. These breakers break on Sand Island, not like on the bar, but I should say in stormy weather, oh, eight or ten feet high. I have stated that these storms come between September and April. The heavy storms will vary in number, possibly two or three in a season. A storm would be a wind velocity of thirty miles or more. A storm of about fifty miles an hour would cover the sands immediately south of Sand Island.

> "Q. I am not so interested in the velocity, I want to know whether a storm of the kind you have just mentioned, which is not a severe storm, but what you call a storm, if that covers all of those sands, or practically all of them, lying immediately south of Sand Island?
>
> A. Yes, sir."

During the winter months the tides are rough and would cover these lower spits. I am talking about normal tides in wintertime. These winter tides, providing the sea is rough, would cover all these sands lying immediately south of Sand Island.

I am familiar with the location of some piling on the sands extending south from Cape Disappointment or on [137] the sands across the channel from Cape Disappointment and on the sands south of Sand Island. There is old dock piling there. So far as I know the dock was used for receiving fish. I don't know when the piling was put in. The piling

(Testimony of Lars Bjelland.)

are in the same place where they were originally put in, but the channel has moved. I have observed the location of these piling during the past two years. I do not know whether there was any drag seine fishing on the sands projecting from Cape Disappointment and on the westerly side of the channel between Sand Island and Cape Disappointment.

Cross Examination of Mr. Bjelland

I was at the Grays Harbor station from 1923 to 1929, which is about forty-eight miles north of Astoria. Before going to Grays Harbor in 1923 I was stationed at Hammond for five years. Hammond is on the south side of the Columbia river, in Oregon, about twelve miles west of Astoria, and about one mile east of Fort Stevens. It is about four and one-half miles from Sand Island. There is another life saving station just across the channel from Sand Island at Fort Canby, which is about a mile from Sand Island. I was never stationed at the Fort Canby station. I keep at our station an official record of storms and wind velocities, and also have tables of normal tides. We keep no record of abnormal or extraordinary tides, except what appears in the tide tables. If the tides vary from what might be called normal tides as recorded in the tide tables, there would be no record of such variance or of abnormal or unusual tides. That is, there is no measurement taken of how high the tides were. The official records we keep give the date of a storm, the direction of wind currents and their velocity, and the [138] like. I did not bring any of that with data

(Testimony of Lars Bjelland.)

with me, nor did I bring with me any data concerning the normal tidal movements.

I have gone on to Sand Island in recent years. The last time I was there was about three months ago. I went there for the purpose of furnishing transportation for the United States Engineers who were making a survey of the island. I took them over in a boat and accompanied them on to the island. We covered the island from the east to below what was called the lagoon. That was in March of this year. I went on to the island. I was on the island about six months before that for the same purpose. I would not say when I was on the island before that. We landed there several times during wreck operations, running lines ashore. The wrecks I refer to are assisting fishing boats when they run afoul of dikes or traps. We really assist from ten to fifty boats every season. I am not able to say when I was on Sand Island in the wintertime except in March of this year. I think I was on there in wintertime about a year before that. I could not say whether I was on Sand Island at all last winter, except in March when I took the engineers over. Nor could I say whether I was on Sand Island at all during the preceding winter, nor the winter before that. I am not able to say when the South jetty was either begun or constructed. The South jetty starts near Fort Stephens about a mile east from our station at Hammond. But I do not know when it was begun. There is work still going on. I could not say when the North jetty was built.

(Testimony of Lars Bjelland.)

I located some fishing operations on the sands south of Sand Island on the 1934 map. Assuming this map is drawn to its scale of about a thousand feet to a quarter of [139] an inch, these sands are about 1500 feet south of the high water mark of Sand Island. The seines were being dragged in or landed on the southerly or ocean side of these sands. The structures that were being used in connection with these operations were on the sands, and probably at least a thousand feet away from the white line marking the south point of Sand Island, of the high water mark, and these structures consisted of a messhouse, bunkhouse, accommodations for horses, etc. The dock which served these operations was built out on these sands and projected northward toward Sand Island. The boats which came in there to serve these operations came into the channel between these sands and Sand Island.

I spoke of some piling. This piling is considerable to the west of where the fishing operations were being carried on in 1934. The old piling may have been driven some years ago and was used in connection with securing their barges.

"Q. Do you remember, as a matter of local history down there, that as these sands shoaled up and pushed towards Sand Island that dock which was inshore between the sands and the island, got sanded up?

A. Yes."

(Testimony of Lars Bjelland.)

I don't remember how many docks were built, but I do remember there were two or three. I remember when the dikes were constructed along the south shore of Sand Island. The purpose of constructing these dikes was to bring the current farther south. I am unable to say whether the current was moving north and washing away the shores of Sand Island.

Redirect Examination

The data with regard to wind velocity, tides, etc., are available at the station at Hammond. It is available to counsel for defendants by permission of headquarters. It is not available to the government without permission from [140] Washington, D. C. What I testified to with regard to tides, winds and current was within my personal knowledge. I passed up the shores of Sand Island probably every other day from May 1 to August 25. The frequency with which I am in the vicinity of Sand Island varies according to whether we have anything to do in that location. We have occasion to go down there once in a while, possibly as often as once a month, during the wintertime, maybe sometimes oftener. Our work does not carry us on to the island very often. We patrol along the island and most of our patrolling is from the North jetty and up along Sand Island. Our regular route of patrol carries us past and in good view of Sand Island and the shores of the island.

(Testimony of Lars Bjelland.)

Recross Examination

I mentioned from May 1 to August 25; that is the gillnet season. That is the quiet season. There is not many storms during that season, that is very many severe storms. Whenever we go out on any trips in winter that have peculiar relations to my life saving duties a record is made and a log is written up. These logs which I keep would tell just how many trips I made last winter and how many the winter before, where I went on these trips, etc. I have all that data at my station at Hammond.

Redirect Examination

My experience has given me the opportunity to observe the tides and breakers that are common and which may be found during the storms in the estuary of the Columbia River. The breakers vary according to the depth of the water. You take a steep beach and you will only have two breaks in a steep beach. Where you have a shallow beach you have five or six, or maybe eight breaks before she hits the beach. [141] The lower end what I mentioned above as the south end of Sand Island is shallow.

Recross Examination

Breakers are those waves that roll in. They come into the lower Columbia under very much the same conditions that they come in anywhere else. If there is a long, level stretch of sand a wave rolls and rolls and rolls before it spends itself. If it breaks up

(Testimony of Lars Bjelland.)

against abrupt walls it spends itself in one smash. Water does that everywhere, whether in the Lower Columbia or elsewhere. [142]

L. WOODWORTH,

a witness for the plaintiff, testified:

I reside at the Coast Guard Station at Cape Disappointment near Ilwaco, Washington and am the officer in charge. I have been in the Coast Guard Service about 15 years and have been at the Cape Disappointment station for about 21 months. I was there first in 1921 and was transferred away and then came back in 1925 to the Point Adams Station on the Oregon side where I served until 1930 and was then transferred north to Willapa. Point Adams is about four or 5 miles Southeast of Sand Island which is in Clatsop County, Oregon. Cape Disappointment Station where I have been located for the past fifteen months is at Fort Canby on Cape Disappointment, Washington, about 5 miles from Ilwaco. It is about here (pointing to the left of a star where the little white line runs out west on the 1934 map and to the word "Rear" and "R"). There is a lookout station on the top of Cape Disappointment which is marked by a star, on the extreme southerly tip of Cape Disappointment. There is also a lighthouse at the same point. Different men have kept lookout at the lookout station during the past 19 months. I have charge of the station but I don't

(Testimony of L. Woodworth.)

stand watches there. Each man on lookout serves 4 hours and the watch is held continuously throughout the 24 hours of each day. I have charge of the station, visit the lookout each day, may be up there five minutes and may be up there one hour. The lookout is maintained for the purpose of sighting vessels in distress or persons in distress. The lookout also keeps watch of the condition of waves and tides. In the performance of my duty I have at different times observed waves and tides and currents. At different times there are [143] storms, other times calms. I have had occasion to measure the tides. On December 19, 1933, or along about there, we had a big storm and I measured the tide, it was 16 feet. This measurement was taken off the U. S. Engineers Tide Gauge located on No. 3 channel light stake, which is at the asterisk designated as Ilwaco channel "3 FW" situated just north of the easterly portion of Sand Island, and in Baker's Bay. I measured the tide on October 21, 1934, during a storm and it was a 16 foot tide.

In December, 1933, we had a 16 foot tide. The following day I measured, it was a 11 foot tide. This was during a storm that had continued through several days. I have measured the tides there on other occasions but didn't pay much attention unless there was a storm on. Storms are accompanied by large breakers which hit the banks and sands in the vicinity of Sand Island. These breakers have different heights, they are higher when the storms are

(Testimony of L. Woodworth.)

severe. They run from 6 feet to 12 feet. I am now referring to the breakers that break on Sand Island and the sands around Sand Island. I have been on Sand Island from time to time and have observed conditions there. The waves and tides and currents have direct access from the bar to the sands of Sand Island and the sands immediately south thereof. The waves and breakers on the main shore of the ocean are heavier than those that break upon Sand Island and the sands south of Sand Island but I am not able to estimate how much heavier. Sometimes on the outside they are 40 or 50 feet high during severe storms and the highest breakers I have noticed on the shores of Sand Island I would judge to be from 8 to 10 feet, just high enough to go over the boat. The breakers during these severe storms will move the sand around and wash it in or wash it out, or flatten it down. Referring to the sand south of Sand Island, I have seen a sand washed out, and I have seen it washed in over a period of one month. Sometimes it will take a day, and sometimes it will take a week. What I mean by a sand is this whole body of sand between Sand Island west of Cape [144] Disappointment which are all low sands, and the breakers go clear over. In the winter of 1934, when this big storm came up I have seen the breakers go clear over these sands, clear up to Sand Island, the mainland of Sand Island. They would not overflow any part of the mainland of Sand Island. After one of these storms had hit the fringe of sand

(Testimony of L. Woodworth.)

south of Sand Island our channel would change and we would sound to find out where the deep water was. When I say change I mean it would fill in and at times it would be changed as to line and contour and it would alter the low water mark connoting the fringe of sands south of the island there. Some of these sands would move perhaps 100 or 200 or perhaps 300 feet at a time. That is a single storm might move them that much. I was not at the Cape Disappointment Station in 1929. I observed fishing activities south of Sand Island in 1934. I do not know who was fishing there. I am familiar with the piling located on the sands in this general vicinity. The piling locations roughly estimated are about in here (indicating) on the map of 1934. That is right in the middle of the 1935 channel dividing the sands of Cape Disappointment and other sands; this point is south of Sand Island and easterly and southerly from the figure "10" which is in the channel dividing the sands of Cape Disappointment and other sands. The sands south of Cape Disappointment and west of the channel between Sand Island and Cape Disappointment and also the sands south of Sand Island and east of the channel separating Sand Island and Cape Disappointment are covered by water twice a day at flow tide. [145]

They are below high water mark. The high water line I refer to is the white line drawn on the southerly and westerly edge of the area noted as Sand Island towards the area of sands west of the channel and between Sand Island and Cape Disappointment.

(Testimony of L. Woodworth.)

Cross Examination

I went to my present station at Cape Disappointment in November or December, 1933 and I have not been at that Station since 1921. I went to Siuslaw Station, about 200 miles south of Astoria, in 1921. Was retransferred to Point Adams Station in 1925. Point Adams is in Oregon about 12 miles west of Astoria by road and about 4½ miles from Sand Island. I saw fishing operations in 1934 but do not know who were carrying them on except by hearsay. In connection with these fishing operations I saw on the sands where the fishing operations were being carried on permanent structures such as buildings, docks, etc. I do not recall whether I saw them in 1933 as I came back to Point Adams Station in November or December of that year but I did see them during the fishing season of 1934. I never was at the buildings. Probably was within a half or a quarter of a mile of them. I don't know how late in the season of 1934 these fishing operations continued. I don't know whether the operations continued after August 25th. They were drag seine operations and the drag seines were being landed on the [146] south shore of the sands. The structures were up further to the north on the high sands. These high sands where the structures were located would be about 2000 feet south of this white line on the 1934 map that marks the high water line of Sand Island. I am not familiar with the dock which was used in connection with these fishing operations in 1934 and

(Testimony of L. Woodworth.)

I do not know how the fish was handled after the nets were drawn in on the south shore of the sands. I know nothing about the fishing operations there in prior years. The highest tide I mentioned was registered in Baker's Bay, which is a shallow body of water of considerable magnitude north and west of Sand Island. It was in there that I read the highest tide. On flood tide the waters come into this large shallow area between Cape Disappointment and Sand Island and also around the east end of Sand Island. This big shallow area that is north of Sand Island fills up on flood tide around both ends of Sand Island. If the flood tide is aided by prolonged and heavy winds from the ocean there is a tendency to pile up the waters in the area known as Baker's Bay and in the whole lower Columbia. The higher tide is frequently the result of an ordinary tidal movement plus the piling up of water by long continued heavy winds from the ocean. When the Baker's Bay empties on ebb tide the waters whip around both ends of the Island in flowing out but more on the west end than on the east end. The current there doesn't hurt the gillnetters in these because they don't gillnet in there. They haven't gillnetted there since my time.

The storm in October, 1934, that I referred to was [147] an extraordinary storm. It tore out stretches of highway down there in that vicinity on the north side of the river. I don't know whether it tore out docks and ferry slips. I couldn't say how many miles

(Testimony of L. Woodworth.)

of highway were torn out, not many miles. Between McGowan and Ellis Point up the Baker's Bay end. The recording of the wind velocity at that time broke at 110 miles an hour.

Redirect Examination

I don't know just what were the permanent structures located on the sands I spoke of. There was a stable, or some kind of a building. I did not examine to see whether they were permanent in character. They were washed out in the storm of 1934. Other storms were not as heavy as the big storm I spoke of. That was the heaviest storm I had known down there. We have storms down there from September to April, two or three days at a time. They will let up for a while, and start up again. They average about thirty miles. A storm of that kind would cause breakers to form and wash upon the sands and shores of Sand Island and upon the sands south of Sand Island. That kind of a storm would cause breakers of considerable size. Storms of that kind might occur four or five in one month, the next month we might have one may not have any for a month. These storms last an average of about six or eight hours although sometimes one may last two or three days. [148]

Recross Examination

These storms are not new phenomena. They have been sweeping up the Columbia for centuries, I presume. I believe the storms have been worse in this

(Testimony of L. Woodworth.)

vicinity the last few years than in prior years. I have been only there the last nineteen months but I think we have had more storms up and down the Coast the last few years. I have in my office at Point Adams a record of the wind velocity of every storm that has occurred in the last quarter of a century and if I had that data with me I could tell approximately the wind velocity of every such storm for the last 25 years. Point Adams life saving station is the same as the Hammond Station. Mr. Bjelland calls at the Hammond Station and I call at the Point Adams. This data concerned wind velocity and is published from time to time by the Weather Bureau. There is nothing particularly confidential about it. It is available at the office of the U. S. Engineers in Portland. [149]

WAYNE AHO,

a witness for plaintiff, testified:

I live at Ilwaco which is about a mile and a half north of Sand Island, on the Washington side of the river. I am a fisherman and have been engaged in that occupation for about fifteen years. I have trolled some and have been a gillnetter. There are somewhere in the neighborhood of 2000 gillnetters fishing in the Columbia River. I have never done any fishing on Sand Island but I fished along south of Sand Island and have noticed drag seine fishing

(Testimony of Wayne Aho.)

activities for about fifteen years. When fishing with gillnets I have had occasion to go along the shore of Sand Island. Sometimes I have gone so close to the shore that the boat would hit bottom. Perhaps fifty feet away from the sands. I have been close enough at times to talk with the men working on the beach. I have observed fishing on Peacock Spit. I couldn't say exactly the times of it but years back anyway. The last time I saw drag seine fishing, on those sands lying south from Cape Disappointment and west of the channel was last year. The operations were being carried on by the Columbia River Packers Association and Barbey. I am now referring to the sands south of Sand Island. The Columbia River Packers Association and Barbey were not fishing on the sands just south of Cape Cape Disappointment and west of the channel. McGowan was fishing there with drag seines. The sands south of Sand Island were fished during the year 1931. The fishing started in June and ended the 25th of August. It was right from here down (indicating) that the fishing operations were being carried on in 1934 by Columbia River Packers Association and Barbey. I refer to an area here on the sands south of Sand Island. I don't know the distance but I know that they fished there; as far as the sand went down, they fished. This would comprise practically all of the edge of the sands west on the dike leading out into the ocean, and the southerly edge of [150] the sands —the entire length there. I observed some fishing

(Testimony of Wayne Aho.)

activities at these same locations in 1933 by the same parties and carried on about the same period, that is from June until the 25th of August.

I am familiar with the location of some piling on the sands south of Cape Disappointment and Sand Island. I am indicating on the 1934 map the point where these structures were used to receive fish. The point which I locate is a trifle to the west of the intersection of a cross on the 1934 map which is immediately south of the word "Sand", and that cross I think is on every one of these maps. There were two different constructions, piling, driven in the sands. They extend above water at low tide and also high tide. The other structures on that body of sand lying south of Sand Island are piling driven into the sand where there had been seining houses, about midway; that is on the lagoon side; about midway from the west dike or jetty on a straight line to the mark I made before. These piling were put in to receive the fish when they were seining on the spit and are now in the same location as when they were first placed.

I am not able to give you the number of men who were engaged in these fishing operations in 1934. When the run of fish was heavy there would be more men and boats which would be in August. I estimate the number of men at 48 to 50, four skiffs, 12 men to a stiff. These sands southerly and westerly of Sand Island are partly covered by normal tides, not completely covered and they fished and landed their

(Testimony of Wayne Aho.)

seines during high water. Perhaps a half to two-thirds of these sands would be covered by high tide. There was a place on the west end that would not be covered and going to the east there was a strip that would not be covered. I am referring to the condition as it is now. [151]

I have observed storms in the Sand Island section. Sometimes a storm cuts away the sands lying south of Sand Island and sometimes it builds them up. I have seen that. Storms generally flatten them out. Sometimes it cuts big long gaps in them and then piles them up again and cuts some more some place else and flattens the sands. Well one tide will cut away more and flatten the beach out; the heavier the seas the more she is going to cut. I have seen a body of sand washed away in the course of a short period of time. This is true of sands lying south of Sand Island. I noticed one year and it was the year the North Bend came through, all the sand came off the boy in a few tides and filled half the bay up. I have noticed changes in the shore line of that sand on other occasions. Once in a while the sands will cut in closer and move out again and shift about. A long spit will show up, and the next tide cover up and won't show up again. Once in a while we will have a channel going down below there; perhaps have two feet of water in it; the next tide will be three or four feet; and go down two or three days afterwards and won't be no water there at all; it just shifts back and forth. At such times the sands

(Testimony of Wayne Aho.)

become cut up and flatten out, and sometimes sands filled in. Not over substantial areas, just over small areas. We run out with our boats and dodge sand bars and go around them. Small peaks show up, shallow places, the channel cuts in different angles. There are times when sands will wash away by such storms. [152]

Cross Examination

My home is at Ilwaco and I mostly use the North Ship Channel in going out to the Columbia River to lay out my nets, I mean by this southerly and southwesterly of Sand Island. I have been using that channel for about 15 years. Sometimes we would not use it because it was too rough. I am not using the channel that the North Bend cut through. I am using the channel right southwest of Sand Island, the old ship channel, they call it. It is not where the North Bend came through, the North Bend came through about one half or one mile away. According to my recollection there was never any channel where the North Bend came through. There was a deep place there, and then it filled up. There is a flat there now and high water covers the whole thing. There never was a channel where the North Bend went through that boats used. In gillnetting I usually drift up past Peacock Spit, Sand Island, up as far as Point Ellis, sometimes in Baker's Bay. Port Ellis is about 7 miles up the river from Sand Island. I sometimes lay out as far up the river as far east as Point Ellis, and then back down the river with

(Testimony of Wayne Aho.)

the current and ebb tide. We drift down as far as the end of the north jetty. Sometimes we drift back with flow tide. The last few days I have drifted close to the southerly side of Sand Island and have done so since the dikes were put in. There are three or four dikes built out at right angles from the southerly shore of Sand Island ranging from 1500 to 2000 feet in length. When I drift along Sand Island I drift out beyond the end of these dikes. I do not drift inside the dike. I lay out the nets below or westerly of the lowest or most westerly dike. I have seen other fellows drifting in there but since these [153] dikes were built my drift has always been out beyond. Above and below the dikes we drift next to the beach. I lay out beyond and southerly of the sands and once in a while on high water our nets go over the sands, not completely over but over in the lower point once in a while. Generally, I lay out below and southerly of the sands. I have been on these sands when fishing operations were carried on in 1933 and 1934. The drag seine operations I am talking about were carried on southerly of the lagoon. We clear away the drift so that we can fish high water on Sand Island. The only drift that has been cleared away was what the engineers cleared away when I worked for them and they cleared it away for a railroad track over which they carry rocks for the dikes. Referring to the heavy white line along the southerly boundary of Sand Island, and this area west of the dike, there has not been

(Testimony of Wayne Aho.)

any drag seines, to my knowledge, landed on that for many years that I know of. The white line is in the middle of the island. I may be mistaken as to that. The drag seine operations that I referred to in 1933 and 1934 were carried on west of the westerly dike. The sands didn't reach out beyond the most southerly extremity of the dikes but the seines did. The seines were landed on sands that were directly west of and below the dike. There were some structures to the north about the middle of the sand, of Sand Island. The messhouses were along here (indicating). These structures were all southerly of the white line on the map which has been said marks the southern boundary of Sand Island. The messhouse and structures and dock were all considerably south of that white line and south of the lagoon. The boats which brought in the supplies and carried out fish reached the dock from below the western dike. [154]

They couldn't get in with big boats, it was too shallow, and they put a skiff and small boats in that low water. In 1934 they had a small cut or channel in there that they went in as far as the pilings and they had a scow and they would haul out with the scow and the launch would pull them away. They approached the dock on water which was between the sands and this white line of the Sand Island in 1934. There are three different places where there was piling. The one furtherest west was a place

(Testimony of Wayne Aho.)

where fish was received. It was not abandoned. Peacock Spit use to be outside of that pile, and the channel use to run inside of the Spit and they received their fish on that dock on Peacock Spit. The dock is on the outside of Sand Island now. I couldn't know whether they built another dock further east and south or it was a mess house but they a scow to receive the fish.

Redirect Examination.

Questions by Mr. Hicks:

Mr. Aho, you mentioned the manner in which the fish were taken from the sands and conducted away from the island, placed in some boats. Now I wish you to define that matter more clearly. Did the boats proceed up the middle channel between the sands separating that Sand Island the mainland? Did the boats go up there, or were they barges or tugs, or just what were they?

Mr. CLARK: What year?

A. In the year 1932—no. 1933, beg pardon, they brought in scows, flat bottomed scows. They hauled their fish over on the top of the island with wagons, and loaded them on these scows and towed the scows out, and the big boats took them to Astoria." [155]

When I say they hauled the fish over the Island I mean Sand Island. I do not refer to the mainland above high water, but to the low water mark. I am referring to the sands below the lagoon. That was in 1933. There was piling driven on the inside of the

(Testimony of Wayne Aho.)

lagoon next to the high line where they had a scow, and where the men lived, bunkhouse and messhouse. The bunkhouse and messhouse was on the scow. The only constructions on the mainland there north of the lagoon, the little channel, consisted of six or seven pilings driven there. I have seen the men connected with these operations go out on the mainland. I have seen them walking over the island, when fishing; when they would go to Ilwaco and come back and walk over the island. I have not seen them in 1934. You can't carry on fishing operations on dry land, with nets. They go out in the water, and the only water that can be fished is south of the island. I am now referring to this area lying westerly of this dike mark, which is apparently indicated by the figure "14", which is south and near the mid-portion of what is styled Sand Island. The sands lying off the shore of Sand Island, the southerly shore, and east of the dike could not be fished because they are behind the dikes. They have never been fished since the dikes were put in. It is not practical to fish the little lagoon. Fishing operations have to be out on the outer fringe of sands.

Recross Examination.

I may have said yesterday that other gillnetters drifted along Sand Island inside the dikes. I never did. If I said that I probably was mistaken. The other fishermen didn't lay in there, the tide carries them in. They lay outside. I do say that the only time I saw gillnetters between those dikes was when the tide carried them in there against their will. [156]

(Testimony of Wayne Aho.)

Redirect Examination of Mr. Aho.

This morning I was talking of drag seines. I did not refer to gillnets this morning. I have never seen drag seines operate there since the jetties were put in, inside between the jetties, but I have seen them operate before the jetties were put there. Both kinds of operations are carried on there, gillnetting and also seining below the westerly dike. Gillnetting is the operation that is carried on in the water from boats. We don't use sands. Our nets are in boats and we lay out in boats and pick up in boats; we don't go ashore. The fishing operations that were conducted in 1932 were on the same sands as in 1934. [157]

C. R. GLASGOW

As a witness for petitioner, testified:

I am employed by the U. S. Engineers Department, as survey man, Supervisor of survey parties on the lower Columbia River, and have been on survey parties a little over twelve years.

I identify plaintiff's exhibit 5 for identification, as a map of the 1935 survey of high and low water of the sands near the mouth of the Columbia. I prepared a portion of it and the rest of it was prepared under my direction. This is an actual copy of a map we are going to turn in,—I assisted in making the survey, and while on the ground I directed the survey from which this map is made. I did part of it

[Testimony of C. R. Glasgow.]

myself and the remainder was made by three other members of my party, working in conjunction, under my supervision. The map correctly delineates and defines the map and section it purports to define. We did not use any surveyor's chain. In hydrographic surveying, the locations are made from what we call three-point locations, with an accuracy of less than 1% of error, according to the scale of the map.

This map was admitted in evidence, but owing to its large size, it is impracticable to include a copy herein.

On Cross Examination,

witness testified:

Exhibit 5 is a tracing and copy of the original survey now in our office, from which maps are printed, but none are now printed and available. The map, as a whole, is not completed, as it would cover a larger portion at the mouth of the river. This merely covers a little section North of the ships channel. It takes from three to four months to prepare a chart of the mouth of the river, and as we had not completed our season's work, I prepared this partial copy at the request of my superior. The legend "low water 1935" is the usual legend put on maps, or else a characteristic symbol is placed thereon. Witness then was asked: [158]

"Q. Will you look at these recent maps and say whether that is the usual legend?

A. No sir, it is not on any of those maps that I have examined, no sir; except the symbol that is used for it.

[Testimony of C. R. Glasgow.]

Q. What symbol is used?

A. They use a solid heavy line for high water, and a dotted line for sands.

Q. That is what I understood, and I wondered just why you adopted the language "low water 1935", which I had not observed on the maps running back some eighty years, in evidence.

A. Well, I put that on there on my own in order to try to prepare a clear map, that is all."

We did not make soundings in the entire area delineated by the map. I sounded channel lines from the upper end of Sand Island on the East end into Ilwaco, also all portions of the North jetty inside the Columbia River, across from Sand Island to Clatsop Spit not reaching clear to low water, however, a depth which was about 15 to 18 feet deep off shore.

"Q. Take this area that lies to the Northerly side of the dotted line marked "low water 1935" in and around Sand Island and Peacock Spit and over into Bakers Bay, along Cape Disappointment into the bay. Did you make soundings in that area?

A. No sir, not yet.

Q. That channel that is indicated there, there have been no soundings made in that?

A. Not for three months, I made them three months ago.

[Testimony of C. R. Glasgow.]

Q. Well, why didn't you let us have the benefit of those soundings by putting them on this map?

A. Lack of time."

In surveying the low water and high water lines we have beacons located on the shore and we locate the beacons with a sextant, observing the two angles: on measuring two angles we have the location and we record them in a book and try to take all unevenness or inequality in a beach: the coves and peaks, and on a straight beach we take the shoals practically 400 or 500 feet apart [159] on the scaled map, so they show the true shape of the sand; and continue on that way observing two angles with the sextant on three plotted beacons, then I take a record of the map with three protractors. For the low water, the observations are taken when the tide is out, although we do not get it at exactly low tide. We take it on the lowest tide of the month so as to have an average of the zero tide for about the three hours we worked on the work. The average arrived at is a matter of judgment rather than exact calculation as we do not read any gauge or anything during that time, but we know the time we have to be there and work accordingly. For the line marked "high water 1935" the locations are made similar to the low water. After, to get a day's work in, we have to keep working, so we go up on the high water line, which is higher than any recent tide, and locate the shape or contour on the high water line.

[Testimony of C. R. Glasgow.]

The witness identified the "X" marks on the map as co-ordinants in engineer's parlance, and which indicate known positions but are definitely and accurately located on the map. I am familiar with the location of the third dike coming down stream, which is the middle dike, touching Sand Island. The high water lines are laid out on this map by just walking along the shore and taking our sextant and observing the points along the shore.

I worked on the 1932 map (a portion of plaintiff's exhibit 1); the main Sand Island is in two parts, and the portion indicated by a single line is a dike construction where the island had been cut entirely in two; this was an artifical dike a little over 1000 or 1200 feet long, built to bridge over and connect the two parts.

The "5" on my map of 1935 would at a point on the 1934 map (a part of petitioner's exhibit No. 1) be right in between the center (the middle) and lower dike, which would include the area marked with a star and the legend "entrance front" on the 1934 map. Between the dikes on the Columbia River side of Sand [160] Island, the land above high water is filled in, but is not filled in on the Baker's Bay side. I made no measurement of the distance across the island from the high water line on the river side to the high water line on the Baker's Bay side of Sand Island. These lines are run as I described, but the distances between them were not tested as to accuracy by measurement or otherwise, and that is true of the entire map.

[Testimony of C. R. Glasgow.]

The channel into Sand Island had not been sounded for three months prior to the making of this map. From recollection, I would say that the soundings made three months prior to the making of this map would be a maximum 15 feet and a minimum 11½ feet. In making the soundings on the river side, it is our custom to cross the river on a line coming as close to the beach as we dare, and then go down the beach 1,500 feet or so and cross back. We leave an empty space in between, so there are groups of soundings here and there.

The 1932 map shows a body of sand that lies on the river side of Sand Island and is cut off from Sand Island by a channel, and it is also cut off by another channel into Baker's Bay. From the East end of that detached body of sand are nine or ten soundings to a point opposite the West end of it; we probably have something like that this year since that chart is about one-half as large as Exhibit 5. We did not get all the soundings on that chart, that is why they look so open-like. The 1932 map and these other maps, are not copies of the map we made; it is a draftsman's interpretation of the same and it is a system we use in the Department all the time.

Re Redirect Examination:

Explaining more fully what is meant by variations in the channel, I will say that in my experience, in twelve years, during which I have been walking around these low water sands, we can recall there

[Testimony of C. R. Glasgow.]

one day when the sand will be piled up in certain spots [161] and deep in others. We can go back in two or three days and they will be shifted quite a perceptible amount. It is washing away one day and piling up the next day. These shifts and changes amount to quite a bit in the course of six months,—that length of time. I have not observed these changes in time of storm. You can't work in storms. I haven't been out there under these conditions, but I have afterwards.

Q. Tell the court what happens with respect to the shifting of the sands after a storm, or the shift that is caused by the storm.

A. I don't know I can explain the result but I am not qualified to explain the action.

Q. Just the result is what I mean.

A. It causes—due to some reason, I don't know why, but the channels shift from east to west; that is, the main movement in that vicinity; an easterly-westerly movement of the channel on the waters of Baker's Bay. There is a large body of water there, and on the lower tides they have a tendency to wash deep channels, and then for a period of some time there will be higher tides, and they won't go to that depth, and what washed out the channel one day will build up into a sand spit maybe ten or fifteen days later, during the differences in tides. It is not always due to storm.

[Testimony of C. R. Glasgow.]

Q. Well a normal tide—do those affect the contour of the channel?

A. I don't think a normal tide affects it very much in my opinion.

Q. Would abnormal tides?

A. Yes, sir.

I have noticed a channel shift fifty or seventy-five feet in the course of a week. I can't state any specific distance as to how far a channel may shift in a month, but in a couple of cases down there, in the course of a month, it shifted a couple of hundred feet that I know of. [162]

A. I am referring to the channel between Sand Island and Cape Disappointment, noted on the map as the "Ilwaco" Channel.

In a period of six months I have seen that channel shift a thousand feet. I have seen these extensive shifts on more than one occasion but not more than once to the extent of a thousand feet or more. It is not always jumping like that. The channel is in a constant state of flux and change, and the change is more violent and drastic in the winter time than it is in the summer time.

MR. HICKS: During those periods, just what happens to the sands lying southerly of Cape Disappointment, and those lying southerly of Sand Island: just describe that situ-

[Testimony of C. R. Glasgow.]

ation, those certain changes that you have noted occur there.

A. Well, as I said before, they dig channels in a certain place—they don't build up on the sand—they don't build up such a high body of sand, but at lowest tide you can notice channels appear too. We have waded and swam and walked around at different times according to the times we know where to get our information.

Q. Have you observed sand spits thrown up from time to time? I am speaking of spits of some substantial area.

A. Well, yes, in the course of several months they build up to some considerable extent.

Q. And then have you on occasions seen these sands you are speaking of, in this same section here, wash away during a similiar period, or any period?

A. Yes, it has washed away, and in some places it has built up too.

I did not receive any instructions as to the manner in which the map was to be prepared and I was not familiar with the issues in this case. [163]

Q. I want to ask a question on redirect: What is the fact as to whether or not Sand Island is a military reservation of the United States?

MR. CLARK: I suppose whether it is, or not, is purely a question of law, of which this

[Testimony of C. R. Glasgow.]

witness would have no more knowledge than any other citizen.

MR. HICKS: I can call an official of the Department that it has been long identified by the Department.

COURT: I imagine the way to establish that is by the best evidence because it belongs to the government.

MR. CLARK: I think as far as the facts are concerned, I can tell you what they are:

MR. HICKS: Glad to have you state them into the record; I am sure they would be correct.

MR. CLARK: Whether Sand Island was, or not, at the time above high water, and therefore a part of the public domain, we are not concerned, but during the Civil War, President Lincoln withdrew what was identified as Sand Island for military purposes—withdrew from entry—and on October 21, 1864, at the request of the then-Commander of the Columbia River District, the legislative assembly of the State of Oregon ceded to the United States whatever rights the state had to the lands between high and low water abutting on Sand Island; that is, of course, the lands between high and low water, according to the rules of property of this state, was always vested in the state, regardless of who owned the upland. That, I think, is the entire official history of Sand Island, as far as the State of Oregon and the United States are con-

[Testimony of C. R. Glasgow.]

cerned. We do not, by that, admit that it has ever been used or occupied for military purposes, or for any other purpose by the government, and except as it has been leased, we do not admit that it has been given as vacant land, unoccupied and unused territory, but as to its title, and use for which it was withdrawn, President Lincoln withdrew it for military purposes in 1864.

MR. HICKS: Do I understand you go far enough to say that it is a military reservation of the United States?

MR. CLARK: We have admitted that in 1864 President Lincoln withdrew it from entry as part of the public domain for military purposes. Beyond that there never has been, as far as I know, any official action taken by the President, the Land Department or Congress or any other branch or agency of the government, and whatever its status, it must be dependent entirely upon the order of President Lincoln withdrawing it from public entry for military purposes in 1864. I know of no other official action taken at any time. [164]

MR. HICKS: If we could extend the stipulation one point further to show that since the time of President Lincoln's designation as counsel has noted, the island has been under the jurisdiction and supervision and management of the War Department of the United States.

[Testimony of C. R. Glasgow.]

MR. CLARK: I don't think that is a fact during the history of the island, but I will say that for a great many years, and under the authority given by Congress, the Secretary of War has exercised authority to lease fishing privileges on the land, the right to land drag seines on the island from time to time, since 1894. Prior to that time, occasionally the Commanding Officer of this District has seen fit to make leases. My recollection is the second lease made by the Commanding Officer was adjudged to be invalid for lack of authority of the Commanding Officer to make the lease, but for upwards of twenty years the Secretary of War from time to time has leased the island as part of the lands or public property under the jurisdiction of the War department, and has exercised that authority without apparently being challenged.

MR. HICKS: The court will take judicial notice of the case, Washington vs. Oregon in Volume 211, U. S. Supreme Court Reports; also the decision on rehearing of the case under the same time in 214 U. S. Reports.

COURT: There is an objection to this witness answering that question. That is the condition the record is in now. The objection will be sustained. [165]

Re Cross-Examination:

When I said that the channel was in a state of flux, I meant moving either one way or another

[Testimony of C. R. Glasgow.]

pretty nearly constantly. The channel I referred to was the main cut-off channel between Cape Disappointment and Sand Island. I did not mean to ininclude the entire body of sand between Sand Island and Cape Disappointment. There is some I show above high water there that is not moving at present,—right close to Sand Island, attached to Cape Disappointment.

1935 was my thirteenth annual survey, and that has been my idea of conditions during all of that time. The changes go on every year. They are not always at the same rate. They vary a little. Some years the conditions change to a greater extent than others. You can follow the changes on the chart. I have had to do with compiling information in making these maps since 1923. The map of 1923 was the first on which I worked.

Referring to the 1922 map, the area marked "Peacock Spit" refers to sands between high and low water on the Columbia side of the North Jetty. The left side, ordinarily, is a channel, the depth running from eleven to twenty-nine feet, and opposite that is a body of land above low water marked "Sand Island."

Q. Calling your attention to this sand, you say is in a constant state of flux, marked "Peacock Spit," I call your attention to the first map you made. Now the general conformation marked "Peacock Spit," the sand where that is below high water and above low water, is substantially the same a year later?

[Testimony of C. R. Glasgow.]

A. It would to you, if you look at it,—but if I look at the map, it is different.

Q. There has been some slight encroachment in the way of bays, and things of that kind?

[166]

A. Couple of thousand feet or some such matter.

Q. Your map does not show whether that depth is six inches or sixteen feet below the rest of it?

A. It does not.

Q. It is just anything below low water mark?

A. That is right.

Q. That bay, you say, is two thousand feet wide: maybe it is six inches on top of the sand: washed off. It may be a real encroachment there now. That is correct?

A. Yes

Q. This channel between Sand Island and Peacock Spit is still there, isn't it?

A. In a different location, yes. There is the channel there.

Q. Is there any substantial difference in the east side of that channel?

A. You mean between those two bodies?

Q. Yes,—the channel between the two is for practicable purposes substantially in the same place?

A. Except that it has moved a litle bit eastward.

[Testimony of C. R. Glasgow.]

The 1923 map, which is the first one I made, shows the channel between Sand Island and Peacock Spit in substantially the same location as on the 1922 map, except that it has moved a little to the Eastward, and this sand between high and low water on Sand Island is narrower; shows the channel encroaching on Sand Island and Peacock Spit has built a little further Eastward in two years, moving towards Sand Island. On the next map, Peacock Spit above low water is about the same as on the preceding maps. The channel between Peacock Spit and Sand Island is substantially the same, except it is still moving a little eastward towards Sand Island with a recession on the part of Sand Island, with a depth of water up to 25 feet. The next map shows the channel substantially the same as on the preceding maps. It shows a little projection on Sand Island, which has the effect of an erosion; Sand Island is [167] eroding off on the Peacock Spit side, and Peacock Spit is building out towards Sand Island. The map I have last referred to is the 1925 map. Peacock Spit appears about the same as on the preceding map and Sand Island about the same, and there is another body of sand between the two, which shows above low water. On the preceding map, this area of new sand showed from two to six feet of water; along side, running from 11 to 21 feet deep; showed that sand was growing up from the preced-

[Testimony of C. R. Glasgow.]

ing year, but had not gotten up above low water. I never heard of this sand being known as "Oregon sand;" never heard that expression.

On the 1927 map, Peacock Spit has moved Westward a little with a little erosion off the East side, the side next to the new sands I have just referred to. Peacock Spit is substantially the same shape as before, with a slight erosion on the Oregon sand side of it. On the 1928 map the Oregon sands have changed their shape, but are still there, to a much lesser extent, surrounded by water running from 16 to 19 feet, and Peacock Spit has eroded off a little toward the Oregon sand side, but is substantially in the same form and is substantially the same. The depth of the water on the South, the Columbia River side, of Peacock Spit has varied slightly on these maps. The contour lines indicate: five dots is thirty feet; six dots is thirty-six feet; and the dash line is forty feet.

The 1929 map shows Peacock Spit broken up into seven or eight pieces with a channel across it, but the other channel along side Sand Island is still there. I saw the ship on Peacock Spit and know by hearsay that it was blown across from the Columbia River East through Peacock Spit into Baker's Bay, and was afterwards brought out through the channel alongside Sand Island. [168]

[Testimony of C. R. Glasgow.]

Mr. BOWERMAN: Did you have any connection in your observations there with the passage of this boat through Peacock Spit and the chanel that you sounded and show on this map that year?

A. I don't attack any significance to it; no sir.

Re-redirect Examination:

Q. In the map of 1931, Mr. Gascow, it is noted that there are no soundings for the channel between what has been just now styled the Oregon Sands, and Peacock Spit, and that there are soundings shown alongside the southerly shore of Sand Island?

A. Yes.

Q. Now what has been the practice of your Department in the matter of making soundings? Do you sound areas other than those which may be used for vessels and transportation?

A. Yes, sir, we do sound those, but at very rare intervals, just as a sort of check on what is happening in the vicinity; but most of the soundings are down the channel.

Q. Would there be any advantage in using the other one of the channels I have just referred to—using this channel that appears along the southerly shore of Sand Island, instead of the channel lying westerly, that I have indicated? Be any advantage in using this channel over this one to the west?

[Testimony of C. R. Glasgow.]

A. Oh yes, sir.

Q. What would be that advantage?

A. Is a question of navigation; if one is not deep enough to sound, it is not deep enough to navigate to advantage; would have to go where the water is.

Q. Would there be any other advantage in taking this inward channel here, over this channel here, assuming that was deep enough for navigation?

Mr. CLARK: You mean taking the one next to Sand Island?

Mr. HICKS: Yes, the one next to Sand Island.

A. There would have been advantage, yes; the surf in that channel was pretty high due to shoal water.

Q. Would that be an advantage that would be of some account and some importance to one operating vessels through that section?

A. Yes, sir. [169]

There would be no soundings available for the westward channel of the two channels I have mentioned. You can't tell where the channel is when the depth of water is not there to sound it. Unless you just sound the whole section, you can't pick out where the channel was. When we go there at low

[Testimony of C. R. Glasgow.]

water, you can locate the channel accurately, but if we go in deep or high tide, we don't know where the channel is, and would be sounding for a week trying to find that channel. The several maps I have referred to give the conditions of these channels and the condition of the sands at the particular dates on which the respective maps were prepared. There might be variations in the channels and in the sands, say, six months later. I do not know what the contour of the sands might be later from that portion on the maps. [170]

The 1930 map shows the channel next to Sand Island with a small channel branching from it and the new channel farther North and cutting across Peacock Spit. The channel next to Sand Island was sounded, but not the one across Peacock Spit. Peacock Spit was flattened out and enlarged on this map, but covers the same area towards Sand Island. Sand Island is shown on this map as still receding towards the East. To my knowledge it has been doing this all the time I have been there. During this entire period, Sand Island has been eroding and Oregon Sands, or Peacock Spit, have been following it up. I never knew the sands as "Oregon Sands," but I understand what is meant by the question.

On the 1931 map, Peacock Spit and what was formerly an [171] independent body of sands above low water, is now a compact body and includes a part of the territory which was previously marked

[Testimony of C. R. Glasgow.]

Peacock Spit. It is all joined and on this map is still termed "Peacock Spit", I notice. I called it Peacock Spit on the map I made for that year, and Peacock Spit is the only designation that has ever been given on any of these maps for that area.

The channel next to Sand Island was the only navigable channel at that time, and for that reason it shows soundings, and the channel through Peacock Spit was not sounded as it was not deep enough for navigation, except in emergency. The sands extending out from Peacock Spit are still growing Eastward, South of Sand Island, and parallel to it, and in the 1932 map it is not only growing against the West shore of Sand Island but along the South shore and that is the body of sands I have previously mentioned as being a part of Peacock Spit.

The North end of the channel along Sand Island is closed on the 1933 map and the channel through Peacock Spit shows soundings. A channel has been across from Peacock Spit since 1929, but has never before been deep enough for navigation, and this body of sand extending from Peacock Spit is now extending still further South of Sand Island and has formed a junction with the West shore of Sand Island. The 1934 map shows substantially the same condition, except that the channel through Peacock Spit has moved further East. The 1935 map shows the channel has moved still further East towards Sand Island. This channel has been moving Eastward towards Sand Island for the last three or four

[Testimony of C. R. Glasgow.]

years; toward the Northerly end of the West side of Sand Island this channel is now up against the island, like the old channel used to be. If the movement of this channel continues, another year or two, to move Eastward towards Sand Island, it will be in the same location as the channel shown on the maps begining with 1924 and continuing up to 1931.

[172]

C. L. ROGERS,

a witness for plaintiff, testified:

I am in the packing business, identified with the Point Adams Packing Company, and have been an officer of that company for fifteen years. I reside at Hammond, Oregon, which is about twelve miles by road, and possible six or seven miles by water, from Astoria. I have lived in the vicinity of the Lower Columbia for about forty years. In my capacity as an officer of Point Adams Packing Company I bid on certain sands and fishing sites near or adjacent to Sand Island. The first time was in 1931, and the second time was in 1934. These bids were made with respect to sites along the southern end of Sand Island as shown by maps that are put out by the War Department accompanying the bids. The bids were made to the War Department.

Columbia River Packers Association and Barbey Packing Company entered a joint bid on these premises in 1931, and I think a man by the name of Miller or Muller.

(Testimony of C. L. Rogers.)

"Mr. CLARK: 1931?

A. I think it was 1931.

Mr. CLARK: Barbey, and the Columbia River Packing Company has lease for Sites 1 to 5, in 1931, and in 1930, and '32 until cancelled in May of '32. Was a lease on these sites in 1931, and no call for bids.

Q. I testified I thought it was 1931, perhaps 1930.

Mr. CLARK: The lease is in evidence, and speaks for itself. Could it have been another date than 1931?

A. It could have been. I said I thought 1931. I have not looked it up."

Regardless of what the date is, it is my recollection it is about that time. At the time I mentioned in 1934 the Columbia River Packers Association and Barbey Packing Company entered a joint bid. Plaintiff's Exhibit 7 for identification [173] is the proposal for bids called for by the War Department for these seining sites on the south shore of Sand Island dated April 20, 1934. That was the official form that was issued at that time for entertaining bids, and the form of bid executed by me for my company.

I am not positive that I saw the signatures of Barbey Packing Company and Columbia River Packers Association on proposals for bids, but I believe I did. They entered bids of a character similar to the one I entered.

(Testimony of C. L. Rogers.)

"Q. Can you state as a matter of fact that the Columbia River Packers Association and the defendant Barbey, or the Barbey Packing Company, did enter bids of a character similar or identical with the kind of bid you entered?

A. Yes.

Mr. BOWERMAN: The witness said he didn't know. And these documents are not only in the possession of the government, but in this very same department of the government.

COURT: Yes, if you have the bids and they are in writing, that is the best evidence."

I am familiar with the premises upon which I entered my bid. I have seen them off and on for a good many years, probably I would say off and on all my life. The entire southern shore of Sand Island has been leased in times past from one end to the other. It is not one continuous tract of sand. At the present time it is separated by reason of the building of these jetties, if that is what you mean, but prior to that time it was one continuous body. The proposal for bids in 1934 called for six seining sites, but the way the bids were gotten up you had to bid on the entire lot. I entered my bid in that manner and the defendant companies so bid on the property.

Regarding the contents of my bid, I know without [174] reference to that document the lands and location of the sands upon which my bid was entered.

The witness was then requested by counsel for plaintiff to mark the lands and location referred to

(Testimony of C. L. Rogers.)

on one of the maps constituting Exhibit 1, whereupon it was pointed out that there was a map attached to the form calling for bids in 1934. Thereupon the following proceedings were had:

> "Mr. HICKS: This is Government Exhibit 7. I am glad to offer it in evidence.
>
> Mr. BOWERMAN: If the court please, I want to again insist that no matter what order they make, or what invitation for bid they make, if they undertake to lease something they don't own it is not evidence against anybody, and they can't introduce a proposal of that kind for the purpose of showing title, and that is all this case is about, a question of title. What difference does it make if they map that whole country down there and state they will lease it; is that evidence of ownership?"

It appeared that the government had called for proposals for bids on certain sands on Sand Island in 1934; that Point Adams Packing Company had made a bid. No bids were accepted by the government and no lease made for 1934 on any sites on Sand Island. Exhibit No. 7 for identification was not received in evidence and no bids made by the defendants or anyone else for the year 1934 on sites on Sand Island were received in evidence.

The portion of the lands that were covered by my bid extended from the easterly end of Sand Island straight on down along the low water mark, embracing the sands covered by red marks. I don't

(Testimony of C. L. Rogers.)

know what they mean. Referring to the sands lying just southerly of Sand Island and running the entire length of the shore line, starting from the easterly point and going from one end to the other.

Thereupon the following proceedings occurred. [175]

"Mr. BOWERMAN: Now if the court please, I move to strike the witness's answer, because it is an oral interpretation of the vital part of the written instrument that is not in court, but existing, and is in the possession of the party producing the witness. It is his idea of what was covered.

Mr. HICKS: For the purpose of the record I want to say I don't have that original bid, and I don't believe they are available. There are some records kept in Washington which cannot be obtained. It may be this can, but we do not have it. We have a transcript of the evidence of the bid of the parties that was entered into in 1934 with respect to these premises.

COURT: Would the transcript show the description of the premises?

Mr. HICKS: I am not positive it does.

COURT: You may look the document up until I rule."

Aside from the one time when calls for bids were made by the United States as I have testified, for seining sites on Sand Island during the year 1934,

(Testimony of C. L. Rogers.

there were no other calls for bids that year on any premises on Sand Island or any of the sands adjacent to or abutting from Sand Island. That was the only time that any bids were called for for seining purposes, and that applies to any location on Sand Island or the sands immediately adjacent thereto or abutting thereupon.

I observed the seining operations that were conducted on the island in 1934. They were drag seine operations.

> "Mr. CLARK: You mean on the sands and south?
>
> Mr. HICKS: Yes, Sand Island and the sands to the south, the premises we are discussing."

There was quite an extensive operation there of seining, operated through Barbey Packing Company and the Columbia River Packers Association. I would not attempt to estimate the number of horses used. I didn't attempt to count the number of men, but I imagine around one hundred. I saw these operations only on one or two occasions in the [176] month of August, 1934. I did not observe any seining operations on these premises in 1932 or '33. I was not down in that vicinity in those years while seining was being conducted and I don't recall that I was down there in '30 or '31. I probably was, but I have no recollection. The only time I have seen seining operations on the island and on the sands that we are speaking of in recent years was in 1934. Prior to 1930 I can recall no specific dates or years

(Testimony of C. L. Rogers.)

or instances. I have been down there but I can't recall just when they were.

"Q. Well, be as specific as you can; where were the locations: Where was the location of the dragseine operations that you are referring to, on the sands in this immediate vicinity or the sands lying just south of Sand Island and abutting from Sand Island?

A. Along the southern shore of Sand Island, what we know as Sand Island."

I am referring now to the same premises that I bid on in 1934 along the southern beach line of Sand Island.

"Q. Do you know whether or not said premises were so seined and operated under lease or license from the government of the United States?

Mr. CLARK: You mean in those years he can't identify?

Mr. HICKS: If he knows; he is making it as specific as he can.

* * * * * * *

Mr. CLARK: Objected to as not the best evidence.

Mr. HICKS: If he knows, Your Honor.

* * * * * * *

Mr. CLARK: That is certainly calling as to whether or not a certain document existed and certainly for the contents.

(Testimony of C. L. Rogers.)

COURT: He may answer yes or no, and then you can inquire if he has actual knowledge. I don't know what knowledge he has.

A. Do you refer to the year 1934, or prior years?

Q. I am referring to prior years. [177]

A. I would say that no operations could have been conducted on Sand Island without a lease from the United States Government. I have never known of any seining operations being conducted there without a lease from the government.

Mr. CLARK: I move to strike that out as a conclusion: he obviously has no knowledge: he doesn't say he saw any leases.

COURT: He says he knows, I understand. Did you say you didn't know whether operations were conducted under government lease or not?

A. I said I didn't know of any operation that had not been conducted under lease from the government in years prior to 1934.

COURT: You can move to strike that out.

Mr. CLARK: Yes, I move to strike that out.

COURT: He will have to show how he had knowledge of it."

The practice of the government is to issue a circular proposal for bids and send them out to all interested parties, which permit those interested to enter competitive bids which are then opened and the bid ordinarily awarded to the highest bidder,

(Testimony of C. L. Rogers.)

unless there is some cause, of course, why the government should not lease to the highest bidder.

"COURT: As the record stands the court has not ruled on the motion to strike. He has said that he didn't know of any other leases that were operated except under government leases. I shall have to sustain that motion until he shows that he has knowledge of that fact. That is, how he obtained it, or what it is based on, in view of that motion.

Q. Was any document filed by you or your company with the War Department with respect to the matter, which would constitute you an interested party, or which would inform the Department of your interest in this matter?

Mr. CLARK: In which matter?

Mr. HICKS: In the matter of leasing.

A. In the matter of leasing seining sites?

Q. Yes.

A. We have advised the War Department we were always [178] interested in leasing seining sites; but whether that is in the form of a written document, I couldn't say. We have verbally informed the officer in charge at Fort Stevens, to that effect."

I have examined Exhibit 2 and have noted the names of the operators who paid the rental shown in that exhibit. I saw the Barbey Packing Company's operations on Sand Island, observed them

(Testimony of C. L. Rogers.

from a boat in the river sometime during the period from May 1 to May 25, 1930.

"Q. Where were those premises that they were operating on at the time you mention, with respect to the premises which you bid upon and which you have identified on the map as of the year 1934?

A. Do I understand you to mean the premises that I indicated on that map?

Q. Yes.

A. Those operations extended further upstream from the point that I indicated there, during the time I was there."

The operations farther upstream and started approximately from the most westerly dike, thence upstream probably would be sites 3 and 4.

The operations in 1926, as near as I can fix the point was here (indicating). From a point below the letter "h" after the word "Sand Island", perhaps slightly westward of the letter "h", and then easterly up along the island probably about six thousand feet. The next operation that I recall was in 1934, which extended westerly from the most westerly dike down across the sands which are marked here in red to a point on the map where there is a figure "6." In other words, covering these sands (indicating), covering that area which would be westerly from the most westerly dike.

(Testimony of C. L. Rogers.)

Cross Examination

The plant with which I am connected is at Hammond, which is about four and one-half miles south and east of Sand Island. My company conducted no drag seine operations on Peacock Spit or on those sands which are marked in red or on Sand Island, in the years 1930 to 1934, nor in the years 1925 to 1930. I was not on the sands where the fishing operations were being carried on in 1934. On two occasions I was in a boat on the river in front of these sands. I did not stop there, nor tie up there, but cruised around there on the riverside twice in August, 1934. I probably cruised around there about two hours on the first occasion, and about three hours on the second. I was out there merely to see the seining operations that were going on. I was invited to make the trips by Lieutenants Howell and Thornton, of the United States Army, situated at Fort Stevens. I don't think they were making an official inspection trip. They told me they wanted to get some information as to the seining operations that were being conducted on what they claimed was a part of the government property, and they asked me to go along. I have no way of fixing the time when I saw fishing operations on these sands prior to August, 1934. It was sometime between 1925 and 1930; that is as near as I can fix it. My recollection is that the seining operations that I saw during that time were on the shore of Sand Island easterly of

(Testimony of C. L. Rogers.)

where the westerly dike is. I only saw these operations on Sand Island easterly of the westerly dike between 1925 and 1930 once. I cruised by there once during that time. The fishing operations I saw in 1934 were westerly of the most westerly dike. That is to say, the operations I saw prior to 1934 were along the shore [180] of Sand Island easterly of the point where the most westerly dike is now located, and the fishing operations I saw in 1934 were westerly of the most westerly dike. At the time the fishing operations were being carried on on Sand Island between 1925 and 1930 I knew that Columbia River Packers Association was carrying on fishing operations on Peacock Spit.

"Q. Mr. Barbey was carrying on fishing operations on Sand Island easterly of where the dike is now located, and the Columbia River Packers Association was carrying on the same type of operations, drag seine operation, on Peacock Spit?

A. That is correct."

I never had a lease on any part of Sand Island, and I never saw a lease on any part of Sand Island that was executed. [181]

A. E. CLARK,

a witness for the plaintiff, testified:

I am one of the attorneys in the case, representing the defendant Barbey. I remember a conver-

(Testimony of A. E. Clark.)

sation which you, Mr. Hicks, had with me about twenty days ago, in which you inquired as to whether my client anticipated carrying on drag seine operations on the premises in dispute in this case.

"Q. Just a moment, please. And do you recall at that time whether or not I stated to you that if such operation was not contemplated this case might under instructions from Washington, from the Attorney General, be continued, and didn't I ask you to ascertain that fact, that is, whether an operation was contemplated, and to let know, and upon that decision the case would be set down for hearing or not, as the facts might show.

A. That is part of the conversation that occurred. Do you wish me to state the conversation?

Q. I wish you would, yes, please.

A. You came to my office and we discussed the case. My recollection is the first part of the conversation dealt with your suggestion that you were figuring on bringing in the State of Washington because of its alleged interest; and then you said that—spoke about some difficulty in getting the case assigned because of the disqualification of the two local judges; and said, that if there was no intention on the part of the defendants to undertake to fish upon the disputed premises, probably you could get au-

(Testimony of A. E. Clark.)

thority from the Attorney General I don't know whether you said to dismiss the case, or not to press it. But that was the substance, and you asked me to ascertain what the attitude or purpose of the defendants was. Now, either at that time or a day or two later after I had conferred with the defendants, I told you what the position of the defendants was. I don't recall whether it was that same day, or two or three days later, but I think it was the same day we discussed the situation that had developed. There were sands down there on what we might now call the south point of Peacock Spit. I think I told you at that time that they had been surveyed in 1928 by the State Land Board, and Barbey had obtained a lease; that the Barbey Packing Company, or rather the Baker's Bay Fish Company, had obtained a lease, as you understood from the State of Washington, of Peacock Spit, in which Barbey and the Columbia River Packers were interested, and that the initiative law of Washington adopted in 1934 prevented the obtaining of licenses to fish in Washington; and that it was the purpose of the defendants in this case to ask the State Land Board of Oregon to offer these lands which they had surveyed and had leased in 1928, for leasing at public auction; and if the State Land Board did offer these lands for leasing, and our [182] clients became bidders, and were the suc-

(Testimony of A. E. Clark.)

cessful bidders and got a lease from the State of Oregon, that our clients would undoubtedly undertake to fish those sands under lease from the State of Oregon. I think we talked the whole situation over at that time, and that is the way the matter was left. My recollection is—I am not sure, but in that conversation, or rather in a conversation a few days later, after talking the matter over with Mr. Barbey, you were advised that an application was made to the State Land Board, or would be made, not for a lease, but that they advertise the sands for lease; and that was done, and I think I handed you day before yesterday a request made by my clients to the State Land Board that they advertise these sands for leasing, and they have not done so. Our clients have no lease.

Q. Mr. Clark, when you say 'those sands' you refer to the sands that are in dispute here, don't you; the sands lying southerly of Sand Island and abutting——

A. Well, to make that clear, the sands upon which the request to the State Land Board was based are the sands that were surveyed in 1928, platted out, and which were leased in 1928 by the State Land Board of Oregon to the Columbia Fish Company, controlled by Mr. Barbey, and upon which he seined to some extent in 1929. Now the request to the State Land Board was a request to advertise these particular

(Testimony of A. E. Clark.)

sands, using the precise description that was obtained from the survey of 1928. Now these sands in fact, by building up to the north and west, somewhat joined with what we have been referring to here as Peacock Spit, and now one continuous body of land.

Q. So the record may be clear on that, did you and I have Mr. Lewis, who has heretofore testified, and Mr. McLean, who is here in your behalf, plot out on the map of 1934 the area covered by your application, the one you have just referred to?

A. We requested them to; and we furnished them metes and bounds, descriptions contained in the document I hold in my hand, and which are the metes and bounds descriptions fixed by Mr. McLean when he made his survey of 1928, and I presume that Mr. Lewis and Mr. McLean accurately plotted out these metes and bounds descriptions on the map of 1934.

Q. And how is that designated on the map of 1934?

A. That is—that area is designated by solid red lines; there are a number of red spots around, made by other witnesses, but it is a solid red line outlining what might be broadly referred to as a triangular tract extending northwest and southerly and approximately south of the words "Sand Island." Do you wish to put this in evidence? It might be helpful to

(Testimony of A. E. Clark.)

the other engineers if they wish to check out the metes and bounds outline." [183]

Thereupon Exhibit 8 was received in evidence, which is as follows:

GOVERNMENT'S EXHIBIT 8

Traverse around Sands
Instrument at Hub on sands.
Bearing to Lighthouse—N 69°-02′ W
Thence along edge of sands

Angle	Distance	Bearing
31°-54′ Right	530	N 37°-08′ W
14°-16′ Left	1300	N 51°-24′ W
54°-06′ Left	870	S 74°-30′ W
122°-22′ Left	1200	S 47°-52′ E
56°-06′ Right	1200	S 8°-14′ W
125°-42′ Left	800	N 62°-32′ E
19°-59′ Right	1270	N 82°-31′ E
130°-49′ Left	687	N 48°-18′ W

to point of beginning containing 52.39 Acres. [184]

This application I assume was filed with the State Land Board. It was prepared in our office.

"* * * We prepared in our office not an application for a lease, but a request to the State Land Board that under the statutes of Oregon it advertise these sands for leasing. The statute requires that this, as well as other state property, be advertised, for, I think, not less than thirty days, in not less than two newspapers, and the advertisement must call for bids. I

(Testimony of A. E. Clark.)

think they are required to let the lease to the highest responsible bidder, under the law. I presume that the application or request that they advertise the lands for public use, was filed. I did not go to Salem in connection with the matter."

I obtained no fishing license from the State Fish Commissioner of Oregon to fish this particular area or section.

"A. All I know about that is this: I have been told, and I think it is a fact, that the Barbey Packing Company and the Columbia River Packers Association have obtained licenses from the Master Warden of the State of Oregon to fish with drag seines, and I presume the location where this operation may be carried on will be found entered upon the licenses; and I would suggest in order that the record may show precisely what area the licenses cover, that we have the licenses produced, because I would not be able to say offhand just what location those licenses do cover.

Q. Mr. Clark, the answer and amended answer that were filed in the proceeding, were they prepared by you, or in your office?

A. I think that they were mechanically written in our office, and it may be that the final draft or dictation was by me. They were the result of several conferences between Mr.

(Testimony of A. E. Clark.)

Bowerman and myself before they were put in final form, of course. I think, however, the typewriting was finally done in our office."

* * * * * * *

Q. Now what is the fact as to whether or not you have been using your best efforts to obtain fishing locations in behalf of the Barbey Packing Company and Mr. Barbey, to lease sands and to use and operate drag seines upon these disputed premises in this case?

A. Well I have told you all the efforts we have made, and I will admit that as to the efforts we did make they were the best we could make. The only effort we have made so far is to request the State Land Board [185] to advertise those sands which they leased in 1928, for public leasing now, in the hopes that we may become—our clients may be the successful bidders. They may not be."

In the State of Washington there is a lease out on Peacock Spit which the State of Washington claims takes in all of these sands. Oregon claims it owns part of the sands. In Washington I don't think since last Fall a drag seine license might be issued because of an initiative bill passed by the people of Washington in 1934. The question of the constitutionality of the law was argued in the Supreme Court of Washington some weeks ago, as I understand it. Aside from that there has been no effort made to get a location, and I had nothing to

(Testimony of A. E. Clark.)

do either with the issuance of fishing licenses or the application therefor. The lease made in 1928 by the Oregon State Land Board, which I referred to, was not only for a period of one year, it was for a period of either three or five years. The sands were building up, there was some fishing done on them in 1929, and then the lease was subsequently cancelled because the State of Washington claimed the sands belonged to it and threatened to prosecute Barbey, and of course, if prosecutions were undertaken and sustained the gear would be confiscated, and we advised Mr. Barbey not to take a chance of being arrested and having valuable gear confiscated. I told the State Land Board he didn't want to get into a controversy between the two states, and the lease was cancelled I think in 1930. Barbey was the president of Columbia Fishing Company, to which the lease was made.

Cross Examination

"Q. The threat to fish down there by the defendants, as far as you know, consists of application to the State Land Board for a lease, that is, application to the State of Oregon to advertise and give an opportunity for everybody to bid on the lease, so anybody [186] could fish.

A. Yes, that is as far as the matter has progressed as to any of these sands in the State of Oregon. As far as I know it is merely a request made by Mr. Barbey, I know, and I think

(Testimony of A. E. Clark.)

the Columbia River Packers Association have signed the request, that the State Land Board simply advertise these sands for leasing to the highest,—as the statute requires, of course—the highest responsible bidder. I think a hearing was had—I was not present; the State Land Board, as far as I am advised, has not yet taken any action with respect to whether it will or will not advertise these sands for leasing. If they do, and they are leased, they will have to be leased, under the law, to the highest responsible bidder."

* * * * * * *

I think a correction should be made. I said the 1928 lease of the State Land Board to Columbia Fishing Company had been cancelled by the State Land Board for the reason I gave in my testimony. Since that testimony was given Mr. Wade, an Assistant to the Attorney General of Oregon, has told me that there was no formal cancellation made by the State Land Board. Apparently what happened, the Columbia Fishing Company paid two years rent and, for the reasons stated yesterday, that is, threats by the State of Washington, the Columbia Fishing Company just quit operating on the sands. No further rent was paid, and there was no further operations on the sands. The lease subsequently was terminated by limitation. I assumed that there was a formal cancellation, but apparently there was not.

(Testimony of A. E. Clark.)

The parties just quit functioning under the lease after two years rent had been paid, without action on either side.

* * * * * * * *

Redirect Examination.

I told the attorney for the plaintiff a short time ago what I understand to be the fact, that the defendants have taken out some licenses to fish. I don't know how many. [187] They would have to take out a license for each dragseine they were going to operate. I had nothing to do with the securing of these licenses from the Master Fish Warden of Oregon. The licenses are available, undoubtedly. I don't know what description is contained on any of the licenses. I would much prefer that the licenses be produced than to undertake to state a description with which I am not familiar. I do know that the defendants have told me that they have licenses.

Recross Examination

"Q. That is, licenses to fish somewhere in that territory?

A. License to fish with drag seines down there, but of course to land the drag seines you must have a right to land upon soil at least above low water, which must belong to somebody. If it doesn't belong to the State of Oregon, or the State of Washington, it must belong to the government, because somebody owns, under the law of this state, all land above low water in the Columbia River. The state

(Testimony of A. E. Clark.)

has repeatedly asserted its right to control, sell or otherwise dispose of all flats and sands that finally emerge above low water. That was settled in the Van Dusen case."

Redirect Examination

I don't have a copy, authenticated or otherwise, of the fishing licenses issued. I am sure Mr. Barbey or Mr. Thompson will make them available, whether they are in the court room or not I do not know, but if they are not and you want them we will have them here at any time.

Recross Examination

Exhibit 9 for identification is a copy of the request or application that I referred to as made by the defendants to the State Land Board of Oregon, that the lands referred to be leased upon open auction bidding. This is a carbon copy I brought up from our office yesterday or the day before at the request of Mr. Hicks. I gave the original [188] out. I think the original was signed in our office by the defendants before it went to the State Land Board. I think the description in Exhibit 8 corresponds with the description in Exhibit 9. There is this difference: Exhibit 8 consists merely of description; Exhibit No. 9 for identification is the request to the State Land Board, including the description. I assume it is the same description that the engineers platted on the 1934 map; at least that is the description that the engineers were to plat on the map. I have no

(Testimony of A. E. Clark.)

means of knowing whether the engineers did plat this description on the map, because I did not follow their work while they were putting it on the map.

It is my recollection that the request had not been filed with the Oregon State Land Board at the time I had my first talk with Mr. Hicks, although I am not entirely clear upon that point. We discussed the situation with respect to the law in Washington. I have a distinct recollection that I told him we were going to make a request for a lease, or start the machinery in motion for a lease from Oregon. But I don't think that it had been done when I first talked with Mr. Hicks. The substance of what I told him was that we hoped the State of Oregon would advertise what we call the Oregon sands, being the same sands they advertised and leased in 1928. In that event our clients would bid on them, and if they were the successful bidders and got a lease on these sands they would attempt to fish them. Of course Mr. Hicks understood perfectly that if we were not the high bidder we would not get the lease, because he is quite familiar with the law.

Exhibit 9 was offered and received in evidence as follows: [189]

(Testimony of A. E. Clark.)

DEFENDANT'S EXHIBIT 9

May 31st, 1935

To The

State Land Board,

Salem, Oregon.

Gentlemen:

Application is made by the undersigned for the leasing, by open auction bidding, on the following isolated lands in the Columbia River, to wit:

Beginning at a point called the initial point being N. 32° 8′ 59″ W. a distance of 28169.1 feet from the northeast corner of Section 7, T. 8 N., R. 10 W., W. M.; thence N. 37° 8′ W. 530 feet; north 51° 24′ W. 1300.00 feet; S. 74° 30′ W. 870 feet; S. 47° 52′ E. 1200 feet; S. 8° 14′ W. 1200 feet; N. 62° 32′ E. 800 feet; N. 82° 31′ E. 1270 feet; N. 48° 18′ W. 687 feet to point of beginning, containing 52.4 acres, more or less, being tide island in projected sections 14 and 15, T. 9 N., R. 11 W., W. M., together with all accretions thereto and enlargements thereof.

COLUMBIA RIVER PACKING COMPANY, INC.,

by.....

BARBEY PACKING COMPANY

by....." [190]

(Testimony of A. E. Clark.)

Redirect Examination

I have a distinct recollection that I discussed with you (referring to Mr. Hicks) the matter of the application to the State Land Board.

"A. And I have a distinct recollection of telling you that if we didn't get the lease we couldn't fish down there. And I also have a distinct recollection of telling you that it was my understanding that we were going to take steps to have that advertised. Now I would not go as far as to say that I told you, or that we discussed what steps had been taken, but I do recall stating that that was under consideration. I think the steps were taken after we had the conversation, that is, the definite steps in the way of the request. I know we had quite a long conversation about various phases of the situation down there.

Q. Now is it not true, Mr. Clark, that it was to the interests of the plaintiff, and of your clients, and of yourself, if fishing activity was not contemplated upon the sands in dispute, to have the case continued, and you thought it might be disposed of in some other way; and didn't I in all good faith come and put my proposition up to you.

A. No doubt, Mr. Hicks, you came in absolute good faith and said if there was—if our clients were not to undertake any fishing down there that there would be no necessity of going

(Testimony of A. E. Clark.)

forward with the case. We discussed the fact that they couldn't get a license in Washington, so we concluded that phase of the controversy, and I told you, as you will recall that after the discussion the first time I told you I would have a further discussion with my client.

Q. Yes.

A. My recollection was with particular reference to what they were going to do about seeking to get a lease from the State of Oregon. Subsequently, after talking the matter over with Mr. Barbey—I don't think I talked it over with Mr. Thompson, I am not sure about that—but I did talk it over with Mr. Barbey, and I called you up on the telephone, or maybe you came to the office a second time; then I told you they were going to take steps to see if a lease could be obtained, and in that event we would fish if we could, and fish if we were not enjoined, in case they might be able to get a lease from the State of Oregon. And that I think is our position, as far as I am advised now; but on the question of your good faith in coming to my office, there is no doubt about that.

Q. And is it true that efforts to obtain this lease, and to obtain the right to fish the premises in dispute [191] here are being carried along and expedited as rapidly as reasonably can be?

A. Yes, I think so; the matter is still before the State Land Board. The State Land Board

(Testimony of A. E. Clark.)

has not decided even yet whether it will advertise those sands for leasing. My present information is that that matter will be the subject of another hearing next Monday, at which time the State Land Board may decide to advertise them for leasing, in which event they will have to be advertised for thirty days. The State Land Board may decide not to advertise for leasing, in which event the matter will go over.

Q. Mr. Clark, do you know whether or not the defendant companies had a lease or license to operate on these disputed premises during the years 1933 and 1934?

A. 1928—going back to 1928—I am going back to that because it is part of the history, the Columbia River Packers Association was operating on Peacock Spit and pretty well down towards these sands, and that was the year the Barbey Company leased—that is the Columbia Fish Company got the lease on what is called the Oregon Sands. That situation continued until 1930 or 1931. The Columbia River Packers Association was operating under a lease from the State of Washington, and as I recall it, the State of Washington gave a new lease in 1932, in which they undertook to assert jurisdiction over the entire Peacock Spit, including the Oregon Sands, which had joined onto Peacock Spit; and under that lease drag seine operations were carried on under that

(Testimony of A. E. Clark.)

lease and under license from the State of Washington. Under a prior lease—under a prior lease from the State of Washington and drag seine license from the State of Washington, carried on until 1932, and under renewed lease 1932, 1933 and 1934, all under license and lease from the State of Washington.

Q. Now the leases held by the defendants for the premises in dispute were cancelled under date of May 10, 1932, were they not?

A. You are speaking about another lease; you are speaking about a lease from the United States.

Q. Yes.

A. Yes. That is the last lease that was had on Sand Island, was taken—these sites 1 to 5 inclusive; was executed in 1930 and the lease was cancelled by the War Department effective May 10, 1932. In the meantime, of course, under the lease and license from Washington, the drag seine operations were being carried on on the [192] sands all those years, to the south of Sand Island.

Q. Well, there was no government leases after 1932 with respect to the disputed premises?

A. Well there was no lease at all, as far as I know, on any part of Sand Island. I don't admit the disputed premises are on Sand Island. I am not debating that with you; but

(Testimony of A. E. Clark.)

put it this way: There was no lease, as far as I know, on any part of Sand Island issued by the government of the United States after the lease of 1930, which was cancelled in 1932."

Whereupon the following proceedings were had:

"Mr. HICKS: I think we can stipulate this. May it be stipulated that on a date last week Mr. Bowerman, representing the defendant companies, the Columbia River Packers Company, and the Baker's Bay Fish Company, appeared before the State Land Board—and Barbey individually—and urged that the application which Mr. Clark testified to go through, and that the lands described in the application be put up for bidding. May that be stipulated?

Mr. BOWERMAN: Will be glad to stipulate if you will cover the field. If you will also stipulate that the Point Adams Packing Company, as represented by the plaintiff's witness, and other competitors, appeared and opposed it. I guess we are all willing to stipulate.

Mr. HICKS: Will be glad to stipulate that. And may it be stipulated further Mr. Bowerman, that you informed the State Land Board at that hearing that if the lands were left for leasing and the bids were accepted, that your clients, the ones we have referred to here, would bid upon the premises?

(Testimony of A. E. Clark.)

Mr. BOWERMAN: Oh yes.

Mr. HICKS: And fish.

Mr. BOWERMAN: I didn't undertake to commit my clients except to the extent that we would bid if given an opportunity. I didn't want them to feel I was making an idle gesture. I told them if given an opportunity we would bid, and bid a substantial amount, without naming it. I was authorized to make that representation.

Mr. HICKS: What is the fact as to whether or not this meeting of the State Land Board was called at your instance to entertain that question? [193]

Mr. BOWERMAN: I don't think so; I think that was a regular meeting had, as I understand. I was told that was an appropriate time to be there, but I didn't ask anybody to call a meeting, I am sure.

Mr. HICKS: I mean the matter of entertaining an application for bids. That was done at your instance as to that date, was it not?

Mr. BOWERMAN: I didn't look into their minutes. They had the Governor, the Secretary, the Treasurer, the Attorney General, and the Clerk of the State Land Board assembled there, and I understood it was a regular periodical meeting that I had been privileged to attend and submit this matter.

(Testimony of A. E. Clark.)

Mr. HICKS: You understand I am not speaking about the date of the meeting, but whether called specially for that purpose. I am inquiring to know whether the applications you filed there were brought up for consideration on your motion and at your instance, at that time.

Mr. BOWERMAN: I don't think so. The meeting was called, the Governor presiding, and I was given an opportunity to make an opening statement and present what I had to present orally, and this other document in writing, which was signed by the companies, and representatives of competing companies were there, present with their attorneys, and they made an argument against the State asserting its rights in the island, and that is the way it sets, as far as I am concerned, except the Assistant Clerk of the Board told me the other day he thought they were going forward and advertise for leases. Whether he spoke with authority or not, I don't know; he told me that this week.

COURT: Do I understand you are stipulating to what has been stated between counsel here now, now in the record?

Mr. HICKS: Yes, we are stipulating to that.

COURT: Conversation you had between yourselves?

Mr. HICKS: Yes.

COURT: It is stipulated.

(Testimony of A. E. Clark.)

Mr. HICKS: Yes, and may form a part of the record. I am asking to have the tide tables marked for identification."

Thereupon said tables were marked Government's Exhibits for Identification 10, 11, 12 and 13, but were not thereafter offered or received in evidence.

[194]

E. M. CHERRY,

a witness for defendants, testified:

I live in Astoria, was born there, lived there until I was a young man, came back in 1908, and have since there resided. I have worked in and about the lower Columbia River in various lines of shipping. I represent Lloyds of London, the San Francisco Board of Underwriters, am president of the Arrow Dock and Barge Company, president of the Port of Astoria, and in other lines of shipping, all of which have more or less bearing on the Port of Astoria and vicinity.

I recall a ship known as the North Bend going aground on the westerly shore of Peacock Spit. I think it was in February, 1928. The North Bend was a 4-masted sailing vessel. It had a tonnage length of about 204 feet, 40-foot beam and depth of hold about 14 feet.

The North Bend went ashore on the outside of Peacock Spit and a year later worked her way

(Testimony of E. M. Cherry.)

through the spit and came into the channel between Sand Island and Peacock Spit. I saw the movement of the ship across the spit. I have my log book here. The movement started on January 28, and ended on February 8, 1929. The point where the North Bend went ashore on the westerly shore of Peacock Spit in February, 1928, is shown here on the 1928 map (part of Exhibit 1) where the words "North Bend" appear. She dropped into the channel between Peacock Spit and Sand Island about opposite where she went aground, about opposite the star shown on the map. She dropped into the channel between Peacock Spit and Sand Island just about the letter "a" shown on the 1928 map. She worked her way through the spit during a heavy storm the following winter, that is, she went ashort in February, 1928, laid up there during [195] that winter and the following summer and fall, and went through the spit the latter part of January and the early part of February, 1929. As stated, the movement through Peacock Spit to the channel between the spit and Sand Island ended on February 8, 1929. We, that is the Arrow Dock and Barge Company, of which I am president, then towed her into Fort Canby, a short distance north, and beached her. She was full of water, and we pumped her out. On Sunday, February 10, 1929, we sent two boats down there and towed her to Astoria. In towing her to Astoria we followed the channel between Sand Island and Peacock Spit, which was

(Testimony of E. M. Cherry.)

pretty close to Sand Island. We were inside of Peacock Spit and off these sands. We followed the channel that is charted on the 1929 map adjacent to Sand Island. There was no other channel which we could follow from Fort Canby to Astoria at that time. The vessel had a length over all of about 225 feet. When she was towed to Astoria in February, 1929, she was drawing about 14 feet of water, and there was sufficient water in the channel to accommodate her. At the time the towing was done there was a ground swell that would increase the depth of the draft of the vessel maybe three feet, because of the rise and fall of the swells.

I would not exactly say there was a channel left where the vessel worked its way across Peacock Spit. There was a place where she went through, but you would hardly call it a channel; it was a sort of a gash in the sand. I am not sufficiently familiar with the subsequent conditions to know whether a channel did develop at that location; I have not been on Peacock Spit since 1929. [196]

Cross Examination of Mr. Cherry

The North Bend went aground in February, 1928, and rested on the sands about a year. During that time there were several attempts to salvage the vessel, but did not get very far. The owner, Kruse & Banks Ship Building Company, took off all the gear and equipment. They did not take off the masts. There was no machinery. They stripped the vessel,

(Testimony of L. M. Cherry.)

and after they had completed this operation there was scarcely anything left but the hull of the ship.

I observed the progress of the ship through the sands during the latter part of January and the early part of February, 1929. It took ten days for the ship to work through the sands. There were storms during that period. The vessel finally got through on February 8, 1929. Before that I went down and tried to pull her off. We tried to pull her off the first time on January 28, 1929, without success. I was down there several times during this period, and I was on the vessel when she came through.

Following the storm I did not see much difference in the location of the sands and spits and did not notice any channels that has been created following the storms.

"Q. Will you step over to the map here, of 1929, and state from your observation if that doesn't show the condition as it existed after that storm, as you observed it?

Mr. CLARK: That is the condition in May, is it, 1929?

A. May, 1929. No, it wasn't cut up like that.

Q. Just what did that storm do to Peacock Spit, do you know?

A. Well, it drove the North Bend through and made a kind of gash through there. That is about all I noticed."

(Testimony of E. M. Cherry.)

I didn't notice particularly what effect the action of the waves and storm had on the other sands of Peacock Spit. [197] Every storm changes a little bit, but not materially. As a rule heavy storms make some changes, but I don't think one storm would change anything. After this heavy storm the only change I noticed was that the ship had gone through the spit and there was a kind of a gash through the spit.

"Q. Now describe that gash through the Spit to the court.

A. Well, at high tide the sea, when a heavy sea, would pile up on the outside and kind of hurdle over and come through on the inside, but at low tide I say just like a gash in the sand; something like these things you got here, like one of these, like this one here."

The gash referred to immediately behind the ship I would say was around 50 feet. I am just guessing, something like that. I wasn't right there, I only know what I saw from the deck of the ship. As the boat was making its way through the spit the sea would hit the vessel and run up on both sides, and maybe made a gash one hundred feet where the boat was. The sand would fly back more or less. After the vessel got through the sea at high tide would hurdle through there. When we tried to tow the vessel off we always worked at high tide. It was full of water, partly aground and would not float

(Testimony of E. M. Cherry.)

until the tide came in, and when she got safely in the channel she had enough water to float. She was then drawing about twenty feet of water.

Witness excused. [198]

G. T. McLEAN,

a witness for defendants, testified:

I live in Astoria, Oregon, have lived there since 1910. My profession is civil engineer, in which I have engaged for twenty-eight years.

During the years 1911 to 1914, inclusive, I was in charge of construction for the Federal Government on the North jetty, which extends into the ocean from Cape Disappointment. I had charge of all the preliminary work, a construction of channel, docks, warehouses, quarters, shops, tracks, trestles, and about half a mile of actual jetty construction. This work of which I had charge, in addition to jetty construction, included study of the whole of the mouth of the river, surveys of Sand Island, Bakers Bay, North shore, search for dock deposits in the background, and survey and study of the Cape itself with reference to determining the actual line that the jetty was to take. I left the service of the Federal government in connection with North jetty construction to take charge of reclamation work in the filling in in the City of Astoria and the construction of bulkheads on the waterfront. I was City En-

(Testimony of G. T. McLean.)

gineer and was on that work until we entered the war. I enlisted in the army and was in the army a year and a half, and after leaving the army was in contract construction for several years in and about Astoria. The last several years I have been engaged in engineering work and was engineer for the city of Astoria and the Port of Astoria. In connection with my general engineering work on the harbor and the waters of the Lower Columbia I have visited Peacock Spit, Sand Island and the waters in their vicinity all the way from twice a year to six or seven times a year ever since I left the government service, with the exception of the time I was in the army. During that time I have had [199] occasion to make surveys of the sands in these areas.

In 1928 I made a survey of sands which for convenience will be referred to as the Oregon sands. These sands are outlines on the 1934 map which is a part of Exhibit 1, by solid red lines on sands south and west of Sand Island. In making this survey I went on the ground and first established a location or point of beginning and located it with reference to the various survey monuments which were in that vicinity. I think this point of beginning was tied into four or five of these various United States survey points. After that point of beginning was located the outlines of these sands that were exposed were determined and then were platted on the map.

"Q. How do you determine the outlines of the sands to be platted?

(Testimony of G. T. McLean.)

A. In all surveys of sands in the lower river I have a man on one of the government tide gauges reading the tide gauge, and the tide stays at a low water stage for only a comparatively short time, that is, usually a period of time which is too short to make the full survey. And in order to be sure that the line which I am locating is the actual line where the water would be on the sands at low water stage, I locate both the line where the water—the edge of the water where it is at the time, and then have men proceed out into the water until they are in water which is one foot deep. Then I have two locations taken at a certain time, one of them is where the water would appear at tide which is that stage, and the other location where the water would be a foot deep at that stage. Then with the man reading the tide gauge I know how high the water was at that particular time, and I can interpolate between those two locations and find the exact point the low water would be on the sands."

In making these surveys I was actually on the sands all the time. I platted the line that was above low water except for cases where there had been a rise in the tide. The tide might have encroached on the sands as they would be on the actual low water stage, and that point was determined as lying between those two points located. My recollection is that there [200] were fifty-two and a fraction acres

(Testimony of G. T. McLean.)

of the sands surveyed and platted at that time as being above low water. It is the same tract and the same description contained in Defendants' Exhibit 9 (see page 94 supra) [see page 210 of this printed transcript].

I am familiar with the area commonly referred to on the maps and in local parlance as Peacock Spit, by actual contact from time to time since 1911, and prior to that time by studies I made of previous maps. I am familiar with Sand Island also by actual observation since 1911, and by study of prior maps.

> "Q. Now I wish you would come here, and starting back we will say in 1917 or 1918—I believe Mr. Lewis stopped at 1920—beginning with the year 1920, can you state, both from your knowledge of the situation down there, and by making actual measurements on the maps, whether or not Sand Island along the westerly shore opposite Cape Disappointment and along down along the southwesterly shore has been building up oceanward, or receding?
>
> A. I can."

Carrying the history of Sand Island along at intervals from 1920, the map shows a cross at Latitude 46° 16', where it intersects longitude 124° 2'. It also shows a cross at the same parallel East and West of that, crosses on the margins North and South of that, defining the North, South, East and West lines, that cross that I described and gave geographical location of as South and West of Sand

(Testimony of G. T. McLean.)

Island. I am speaking of the 1920 map as well as subsequent maps. In drawing a North and South line from point of which I gave geographical location through Sand Island and drawing one East and West, the southerly shore of Sand Island measures 2050 feet East of this line, and measures 1250 feet North in 1920.

"A. * * * in 1921 the shore line from that same point will be 2100 feet east, and going north to the shore line would be twelve hundred feet. In 1922 going east from the same point to the shore line would be 2150 feet; [201] going north to the shore line would be fifteen hundred feet; in 1923 going east from the point to the shore line would be 2500 feet; and going north from the same point to the shore line would be 1750 feet. In 1924 map, going east from the same point would be 2950 feet, and going north from that same point to the shore line would be twenty-two hundred feet. In 1925, going east from the point to the shore line would be thirty-four hundred feet, and going north from the same point would be 2250 feet. 1926, the distance east would be 3700 feet, and going north to the shore line the distance would be 2450 feet; in 1927 the distance east would be 3900 feet, and north to the shore line would be 2400 feet. In 1928 the distance east would be 4600 feet, and the distance north 2450. In 1929 the distance east would be 4600 feet, and the distance north goes

(Testimony of G. T. McLean.)

to a point on Sand Island where there has been a change, and a portion of it has detached from the island. If I take a prolongation westerly of the south line of the island where it would join the south line of the detached portion, it would be a distance north of 2850 feet, but if I omit the detached portion of the island and measure to the high water line of the main Sand Island it would be 3750 feet north. In 1930 the distance east to high water line would be 4800 feet and the distance north to high water line would be 3100 feet. The detached portion of Sand Island has disappeared on this map. In 1931 the distance east to high water line would be five thousand feet, and the distance north to high water line would be 3600 feet. In 1932 the distance east to high water line is five thousand feet. The line to the north just passes through the high water line in two places. The measurement to the first place would show it as 4600 feet north.

Q. That is the nearest point?

A. That is the nearest point. In 1933 the distance east would be four thousand feet, and the distance north would be 2800 feet. In 1934 the distance east would be 4700 feet, and the distance north would be 4500 feet.

Q. Now on this map which has been introduced as Plaintiff's Exhibit 5, this sketch or partial map for 1935, are those crosses monu-

(Testimony of G. T. McLean.)

ments showing latitude and longitude on the map?

A. No, they are not."

I could spot the locations on the map for 1935 so as to make the measurements. The crosses on the map are what we call coordinates; they are not geographical positions of latitude and longitude. On the 1935 map there would be East 4400 feet to the shore line and North 5100 to the nearest point where it intersects the shore line. [202]

"Q. Then taking, comparing 1920 with 1934, the recession of the shore of Sand Island measured east from the point you have designated, according to my figures, would be 2650 feet, and the recession to the north between those two years would be 3250 feet net that the shore has washed away or receded.

A. Yes, that would be right.

Q. And taking 1935, the recession measured east would be 2450 feet, and measured north would be 3850 feet.

A. That is right.

Q. That is to say, the general tendency as to Sand Island along there was to erode or wash away instead of building up oceanward?

A. Yes, the island did that.

Q. And how long has that process been going on?

A. From about 1917."

(Testimony of G. T. McLean.)

The dikes jutting out from the south shore of Sand Island were constructed in 1933 and 1934. The most easterly, or upriver ones, were begun in 1932, and the most westerly, or downriver one, was in part constructed in 1933 and completed in 1934. The tendency of Sand Island to wash or break up has not been more marked on the easterly than on the westerly end. The easterly end during most of the last twenty years has been fairly fixed in position, with the exception of the extreme east, which for a period beginning about 1911 had a tendency to build east, and during the last six or eight years has had a westerly recession. There is a gap in about the middle of Sand Island where it has had a tendency to wash off the top at different periods and the water break through.

The sands which I surveyed in 1928, with reference to the point from which I made my measurements of the recession of the shores of Sand Island, were situated, as shown in the area enclosed in a heavy red line on the map of 1934, from 1500 to 3200 feet East of that point, and from about 500 feet north to 1500 to 2000 feet south. The closest point of the [203] sands surveyed by me in 1928 to the shore line of Sand Island, that is to the high water line of Sand Island, as shown on the 1934 map, is about 850 feet and in a southwesterly direction from Sand Island.

I observe on the 1928 map a charted channel along the southerly and southwesterly boundary of Sand

(Testimony of G. T. McLean.)

Island, and that channel was between Sand Island and the sands which I surveyed in 1928. The channel shown on the 1928 map between Sand Island and the sands surveyed by me in 1928 ranged in depth from 12 to 16 feet. The 1929 map shows the same channel between Sand Island and the area surveyed by me in 1928 with depths ranging from 12 to 15 feet. The same channel is shown on the 1930 map with depths ranging from 11_2 to 12 feet, and on the 1931 map with depths ranging from 3 to 8 feet. These depths are all at low water. A normal high tide in these waters is about 8 feet, and to get the depth of the channel at ordinary high tide eight feet should be added to the channel depths to which I have testified and as shown on the maps. There is a lapse of about six hours between the ebb and flow of the tide.

The North jetty was completed about 1917. The last enrockment work done on the South jetty, excepting some work now in progress, was completed in 1913. I know as a matter of history that there have been sands down in the waters of the Lower Columbia that have been called "Breakers" at times, "Peacock Spit" at times, and "Peacock Sands" at other times. Taking up the map of 1920, where appears a body of sands marked Peacock Spit on the map, but not at that time connected with Cape Disappointment. There was some uncharted water between Cape Disappointment and Peacock Spit as shown by the 1920 map. [204] In 1921 this body of sand

(Testimony of G. T. McLean.)

was connected with Cape Disappointment and with the North jetty. During 1920 and 1921 there was a tendency to grow north. In 1922 the spit had grown east and had moved north a trifle. It still retained a definite shape and was a large body of land above low water. In 1923 the movement was to the east and south as indicated on the 1923 map, which shows one body of land above low water. The ship channel is between this body of land and Sand Island. The 1924 map shows that the growth of this body of land is still decidedly to the east, with about the same southerly limits as shown on the preceding map. The channel is to the east of this body of land and between it and Sand Island. The 1925 map shows a growth in a southerly direction, with a little growth to the east. And it also shows that about 40% of the area of Peacock Spit is now above high tide lines.

The 1926 map shows the same general contour of Peacock Spit, practically the same easterly limits, with some growth to the south, but with no land shows as above high water. It also shows some detached sands building up east of Peacock Spit.

"Q. You will notice that there is now a body of sand down about the location, approximately the location where you made your survey in 1928.

A. Yes, that is exactly in the same place.

Q. That is a detached body of sand which appears there above low water?

A. Yes, sir.

(Testimony of G. T. McLean.)

Q. With an uncharted channel of open water between it and Peacock Spit?

A. Yes that shows open water there with no soundings between there.

Q. And the channel between that sand that body of sand which appears is 1926 just below Peacock Spit the [205] channel is between that and Sand Island?

A. Yes, the ship channel."

This ship channel had depths ranging from 16 to 24 feet. The 1927 map shows that Peacock Spit maintained its same general outline except that a part of it has appeared again above high tide line. This map also shows a body of sands at the location of my survey in 1928, and there also appears above low water some sands between the area surveyed by me in 1928 and Peacock Spit. The 1928 map, compiled from surveys completed in May of that year, shows that some of these sands go below low water mark, but that there is an area above low water mark at the location of the 1928 survey. The channel between these sands and Sand Island then ranged from 12 to 17 feet.

In 1929 there were some very heavy storms. There was some breaking up occurred during that winter. The North Bend was driven through the Spit. The map of 1929 shows a body of sand above low water at the location of my survey of 1928, and also shows about 20% of Peacock Spit is above high water.

(Testimony of G. T. McLean.)

The map of 1930 shows a cutoff gap or gash through the Spit where the North Bend went through. That is uncharted, that is there are no soundings. This map shows sands above low water in the location surveyed by me in 1928. The navigable channel is East of these sands, between them and Sand Island. There is a channel with no soundings in it between these sands and Peacock Spit; that is, there is some open water there. Peacock Spit is consolidated again and is growing together with these sands I surveyed in 1928; both of them are growing larger.

Turning to the 1931 map, we note this cutoff gap or channel about where the North Bend went through, which is still uncharted, and that part of Peacock Spit South of this cutoff [206] channel has combined with the area surveyed by me in 1928, and the charted ship channel is between these sands, including Peacock Spit, and Sand Island. The whole body of land westerly of this channel, both above and below the so-called cutoff channel, is designated on the map as Peacock Spit, and according to this map was all above low water.

Turning to the map of 1932, it appears that these combined sands maintained substantially the same contour excepting that the entire body has moved easterly. The actual area is about the same, but there has been some erosion or washing off on the west and south, and they have grown or extended towards the east.

(Testimony of G. T. McLean.)

Turning to the map of 1933 it will be seen that south of this cutoff channel above referred to there is a solid, continuous body of sand which, since the preparation of the 1932 map, has formed a juncture on the north end with Sand Island.

The 1934 map shows the same general body of sand, very similar in area except that it has moved slightly to the north and somewhat to the east.

In 1933 there was still a channel between Sand Island and these sands, with an approach from the easterly end of the sands. The 1934 map, which is dated June, July and August of 1934, still shows a small gap along the side of the lower dike leading into the water immediately south of Sand Island.

1932 was the first time, at least as far back as 1920, that the channel between Sand Island and these sands was not charted. In 1920 there was no channel shown out of Bakers Bay west or north of Sand Island; at least no sounding is given. In 1929 there were soundings shown in the so-called [207] cutoff channel, with a controlling depth of four feet. In 1930 it was not charted, nor was it charted in 1931 or 1932. It was charted in 1933, with a controlling depth of five feet, that is five feet was the shallowest point. In 1934 it was charted with a controlling depth of six feet, and on this 1935 map or tracing (Exhibit 5) it is not charted; that is, it has no soundings except one or two.

Going back to the survey made in 1928, I used ordinary surveying equipment, such as transit, chain, stadiarod, etc.

(Testimony of G. T. McLean.)

I know the location of the several docks which were built on Peacock Spit to accommodate the fishing operations of the Columbia River Packers Association, and subsequently the operations of this company and Mr. Barbey, under lease from the State of Washington, and can locate approximately where these several docks were built. I will use the 1928 map, because it was in that year the first dock was built and it will give a more graphic idea of the movement. I will put three red dots on the map showing the location of the three different docks as they were driven. The first one was driven in 1929, and at a point indicated by the most northerly and westerly red dot which I have placed. The second dock was driven the following year, for the reason that the first had been covered by sands so that boats could not reach it. The water in front of the dock had shoaled up. The point of location represents the easterly part of the dock and the dock extended thence in a westerly direction to the land. When boats approached the dock they came through the channel between the sands and Sand Island. The dock extended from the sands into the channel between these sands and Sand Island. There was a small bay making off the channel between these sands and Sand Island [208] and the dock was constructed in this bay. The bay was inside, between the sands and Sand Island.

The second dock was built at the place indicated by the red dot, but a little to the south and east of

(Testimony of G. T. McLean.)

the first dot, and the third dock was built at the point indicated by the most easterly red dot, which is over near the channel marking of the channel between Sand Island and these sands. The dock was rested upon and was built out from these sands and extended northerly into the waters of the channel between the sands and Sand Island. I do not recall when the last dock was built. It was there in 1934 and the remains of it are there at this time.

Cross Examination of Mr. McLean

The calculations and measurements made at the beginning of my examination showed a recession of Sand Island northward. I took my calculations from this "X" on the 2' meridian. I did not calculate to the easterly edge of Sand Island but to the westerly high water of Sand Island as shown on the map and used the westerly edge of Sand Island all the way through in making my calculations in that direction.

[209]

The reason for my taking the point which I did is that it is the nearest; there are several other ways of showing the situation definitely and accurately, but there is no other way to do it more accurately.

"COURT: Let us find out what the witness is talking about.

A. These measurements have been taken by a line which runs east and west and measuring in all instances from a fixed, definite point on

(Testimony of G. T. McLean.)

that line east and west. That line east and west always runs through this shore line of Sand Island. Now, you can take another line which runs east and west and make your measurements by it. If you move that line too far to the south, of course it will miss the island altogether and won't pass through the shore line you want to measure to. But if you want to move that line five hundred feet north, a thousand feet north, it will still show the same progressive movement of the shore line of Sand Island. True, the further you move it to the north the less easterly movement it will show until you get to the northerly tip of Sand Island, where it will still show an easterly movement. Then when you pass on around into Baker's Bay and take the extreme north tip of Sand Island, which is entirely off the Columbia River, it will not show any movement there in any way. Now the same thing will apply in measuring the movement on a line running north and south. This movement we measured on a line running north and south, on a line through the island, and the measurements were taken from a certain fixed point on the north and south line, to the shore of Sand Island. No matter where you take that north and south line and draw it on any of these maps, the measurement will show the

(Testimony of G. T. McLean.)

movement northerly of the southerly line of Sand Island. Some places, if you draw it in certain places, it will show more northerly movement than it will in others. In other words, at the west end of Sand Island the movement has been more northerly than it has at the east end. At the south end of Sand Island the movement of a particular spot on the shore has been more on the south side of Sand Island than it has on the south.

Q. Now were you showing then a recession of Sand Island, or simply a recession of the southerly and westerly shore?

A. Was showing both things, both things about the same.

Q. Well now, to show the recession northerly of the entire island, do you think it projects an accurate delineation of that movement by taking your measurements from this little shore line here? I am speaking of the westerly end away from the shore line of Sand Island. Do you think that gives us an accurate picture of that situation? [210]

A. It is accurate on that part of the island, and that being part of the island

Q. You understand, I am asking you about the tendency of this entire island to shift and recede northward?

A. I think I answered that by saying that is part of the island. That is part of the island

(Testimony of G. T. McLean.)

which moves, which actually did move due north. I also stated that the further east you went on the island the less the northerly movement would be.

Q. Isn't it true, Mr. McLean, that instead of the island receding northward, as you have suggested, that this little fringe of sands on the westerly and northerly shore of the island cut off, and that the main bulk of the island, and at least ninety-eight per cent of it didn't shift at all, as shown by your calculations?

A. No, that is not the case, because if the island was big enough, that percentage might be true. But if that southwesterly portion of the island—if you want to go back further than 1920, go back to 1917—if you want to take from 1917 up to the 1934 map, and you want to draw a line at right angles to the shore line of Sand Island, so as to correct any distortion of measurement on angles, you will find the shore line of Sand Island has receded on that line—on that line drawn at right angles to the shore line, for a distance of half a mile."

The recession I was attempting to show was a recession of the southerly and westerly shore line. I could establish the amount of this recession by taking a line drawn at right angles to the shore line of Sand Island, through the center of it, and tracing the movement of the shore line along that line, or I can take a piece of tracing cloth that I

(Testimony of G. T. McLean.)

can see through, lay it on the map of any year you want to start with, and trace the position of Sand Island, then lay that tracing in the same position on each succeeding map and see how the shores of Sand Island correspond from time to time. To show the entire picture it would be necessary to measure all points along the shore line of the island and show them all. The meridian line you suggested cuts through the center of what you say is the bulk of the sands of Sand Island, and that is one way I suggested a while [211] ago that the comparison of this island could be made. I do not think it would be either a fairer or more accurate way of measuring to measure between those meridian points and make my measurements with respect to the high water line of the island. I have measured two points on the island previous and the measurements were accurate on each of these points.

"Q. Now I will ask you to take the map of 1920 and with those two meridian lines I have mentioned, that of 124 minutes and two minutes, the two-point meridian being the one you made your calculations from before, and I will ask you to make your measurements there and note the locations and distance—we will say the locations of the high water mark on Sand Island between those points.

A. That is making measurements along a line beginning at the same point I used before?

Q. Yes.

* * * * * * *

(Testimony of G. T. McLean.)

Q. I will ask you to note accurately the high water line of Sand Island as it projects through that middle of the sands, and we may fairly say that it is the middle of the main bulk of the sands, may we?

A. I don't think I understand that question.

Q. I mean that line goes a little bit westerly of the middle of bulk of the sands. You understand that?

A. That is right."

Now, that measurement on the 1920 map shows a distance of 1100 feet from this cross to the high water line on the southwest edge of Sand Island, and a distance of 6700 feet from the southerly point of location to the northerly high water mark of Sand Island.

Counsel for defendants made the observation at this point:

"We didn't deal with the north shore line up in the Bakers Bay area, which is a long way from the premises in controversy. We only dealt with the recession of the south shore line.

Mr. HICKS: The witness testified he was showing the recession of the island." [212]

Taking the map of 1926 and measuring from the same point, the southerly shore line of Sand Island is 2100 feet distant as compared with 1100, as before testified, and the northerly shore line of Sand Island is 6800 feet distant.

(Testimony of G. T. McLean.)

The direction of the recession of the south shore of Sand Island was northerly and the west shore of Sand Island was easterly. You could not have definitely established that point, or any particular point on the island, unless you gave measurements both ways or tied it into some particular fixed line. It is not true that it would be necessary to form a right angle to accomplish the correct measurement of the recession eastward and westward. To draw an east and west line through one point of the island, or to measure all points of the island from an east and west line, or to measure all points of the island from a north and south line will not establish and measure the true movement of the shore of the island unless you take all points and measure all of them in both directions and make your comparisons in both directions. If you want to measure the entire shore line of the island the best way is to graphically show on tracing paper or tracing cloth that you can see through and you will get a correct picture of the entire shore line with each comparison. I could make such a tracing.

At this point it was agreed that the witness would later make and produce a tracing of the character mentioned.

The survey I made in 1928 and platted in red outline on the 1934 map was made at the request of Burke Packing Company, who had applied to the Oregon State Land Board to obtain a lease of the sands and had been informed by the Board that a

(Testimony of G. T. McLean.)

survey giving description by metes and bounds must be presented to the Board before bids were called for lease. I [213] personally made the survey at the time. In stating channel depths in my previous testimony I stated the greatest depth as well as the least depth. I intended to include the maximum and minimum channel depths as characteristic. These calculations were not roughly made, but deliberately to show the characteristic soundings.

"Q. For the year 1929, I will ask you to step down here and note the same calculation for that year now.

A. In 1929?

Q. Yes, sir.

* * * * * * *

Mr. HICKS: Why, it is the depths of the north ship channel at the southerly side of Sand Island. It is the one he testified to yesterday in this regard."

Reading them all through the thread of the channel as it appears on the map of 1929, I don't remember how far I went yesterday, but I probably read them as 12, 14, 15, 9, 6, 5, 12, probably in that manner.

I testified concerning the location of some docks but I did not make the surveys for them. I don't know if any surveys were made. The piles of one dock are still there; the piles of the last dock are still there. I made a survey to fix the locations where

(Testimony of G. T. McLean.)

these docks had been constructed. I don't know whether the piles of the first dock are there or not, but in previous work on Peacock Spit I made notations of where that particular dock was. I do not know when the third dock was constructed. I do know when the other two were. I think I testified as to the third dock that I didn't know when it was built, but I knew it was there in 1934 and had seen it. I was on Sand Island in May, 1934, but not in the vicinity of the dock. I was again on the island in August or early September, and did see the dock.

[214]

"Q. While you were on the island in 1934 did you observe any fishing activity on there?

A. No.

Q. Sure of that?

A. Sure."

Redirect Examination of Mr. McLean

The Burke Packing Company, at whose request I made the survey in 1928, carried on fishing operations at that time in the Lower Columbia and up towards Skamokawa. I think it has gone out of business. It did not get the lease on the sands I surveyed at that time when they were put up for public bidding. It was not the successful bidder.

Neither Mr. Barbey nor the Columbia River Packers Association had anything to do with the making of this survey, and knew nothing about it.

(Testimony of G. T. McLean.)

Recross Examination of Mr. McLean

Q. Referring to Defendants' Exhibit 9 (see page 94 supra) [see page 210 of this printed transcript] the description therein contained is identical with the area enclosed in the heavy red lines on the 1934 map south of Sand Island, allowing for irregularities or errors which might occur in the width of pencil lines and things of that kind. The description ties to a section corner located on the Oregon mainland south of the Fort Stevens Military Reservation, also to various engineers' service stations that are on Sand Island and on Cape Disappointment. It is not true that if Sand Island had moved or receded that the description would be in error. In addition to being tied to the monument on the Oregon mainland it is tied to other monuments which are still there, and is also tied to the lighthouse at Cape Disappointment, and in my opinion it is accurate. [215]

Redirect Examination of Mr. McLean

Referring to the description in Exhibit 9 and to the area circumscribed by red lines south of Sand Island on the 1934 map, that area does not include any accretions but only includes the metes and bounds description of the area as surveyed and platted by me in 1928. Of course the red lines surrounding the area referred to do not give the metes and bounds. The metes and bounds description appears in Exhibit 9. The red lines merely mark the exterior boundaries of the area as surveyed in 1928, and do not, of course, take into account accretions.

(Testimony of G. T. McLean.)

Recross Examination of Mr. McLean

The area in red does not purport to show what land, if any, if above high water. It shows the land above low water.

At this point the witness was excused, with the understanding that he would make a tracing showing the location of the southerly and westerly shore of Sand Island as shown on the map of 1920, and a tracing of said shore lines as shown on the map of 1934, in order to show the extent to which said shore lines had receded or eroded during said interval.

[216]

W. G. BROWN

witness for defendant, testified:

I am a Civil Engineer, residing in Portland, having practiced my profession since 1889. From 1894 until 1906, I was employed by the United States Government, largely on the Columbia River. Since leaving the Government employ, in 1906, I have followed my profession, largely along the Columbia River, for myself and other parties practically up to this date. In 1894 I worked at Fort Canby on survey, and that winter at The Dalles, and from the winter of 1894 until 1903 I was on the construction of the Cascade Locks. I had charge of the work from 1897 to 1903. At the completion of this project I went to the mouth of the river on jetty work, and in 1904 and 1905 I had charge of constructing gun

(Testimony of W. G. Brown.)

emplacements at Fort Canby, which is on the North side of the Columbia River at Cape Disappointment, about a mile from the present location of Sand Island. I actually lived there from the summer of 1904 until the spring of 1906. I became familiar with the area South of Cape Disappointment, designated as Peacock Spit on the maps and the area easterly thereof, known as Sand Island. I made surveys there and studied the maps of other surveys from the earliest survey made by Admiral Vancouver, I believe in 1792.

On the earliest official map made by the United States, Sand Island was at least two miles south of where it is at the present time. Its origin was the cutting off of the tip of the South sands known as Clatsop Spit on the Oregon side. These sands grew out into the river until they obstructed the flow to such an extent that the current cut Clatsop Spit in two, and the severed part became Sand Island. At that time, what was later called Sand Island was called "Sands" or "breakers", but a few years later it became known as Sand Island. I believe it was so designated for the first time about 1839. Then as Clatsop Spit again grew out into the river, the current shoved this shoal North, and it gradually was pushed [217] further and further to the North until it finally reached its present location. This is shown progressively in a number of different maps the Government published.

(Testimony of W. G. Brown.)

The map of 1870, included in Exhibit 1, is one of the charts showing the location of Sand Island in various years. West of Sand Island, until the jetties were constructed, was a body of shifting sand, known as "Middle Sand" and on the North is Peacock Spit and on the South is Clatsop Spit. In the earliest maps what is now called Peacock Spit was called "North Breakers" or "North Sands", and after the recovery of the ship "Peacock" it was called Peacock Spit. It was a separate sand from Sand Island and its original location was at least three miles from Peacock Spit, at that time. In the earliest times Peacock Spit laid South and West from Cape Disappointment but it never lost its identity of being a spit connected with Cape Disappointment; sometimes it was detached at high water, and even at low water, but that spit always existed from the first maps that we made and was always connected with Cape Disappointment, although on some of the maps there was intervening water of varying depths. In the map of 1851 Sand Island was at least two miles away from Peacock Spit South and East. I am giving the distances roughly. There is no difference in the material out of which Peacock Spit is constituted, or from Sand Island; both are beach sand. The South jetty was finished, I believe in 1895; I went there in 1903, when the extension was begun. The North jetty was finished, I believe in 1913. The South jetty cut across Clatsop Spit.

Taking Exhibit 1, beginning with map of 1917,

(Testimony of W. G. Brown.)

the movement of Peacock Spit and Sand Island may be described as follows: On the 1917 map a considerable portion of Peacock Spit is above low water, with a portion detached and a portion attached to Cape Disappointment. Peacock Spit consisted not only of the area shown above low water and above high water, but also a large base of sub- [218] merged sands shown on the map and these points shown on the map are merely the surface manifestations of the area above low water. The map shows no boundaries of this large base, except on some of the older maps, carrying 16 to 12 and 18 feet contour lines, 18 feet being line where navigation became affected, and when weather conditions permitted, soundings closer into shore,—the maps show the conditions. Taking the meridian line on the maps marked 124-02, the Western shore of Sand Island in 1917 was from 700 to 1000 feet West of this meridian line and taking the latitude line 46-16 North, Sand Island projected about the same distance South of this latitude line, and Peacock Spit was about 1500 feet East, almost on a line with the most Easterly projection of Camp Disappointment. In 1918 Sand Island had moved somewhat to the Westward, with a greater area West of the meridian line 124-02, and the spit had also moved Westward, as well as a large detached portion of it which had moved towards the North jetty. The 1919 map shows the spit had enlarged and the detached portion had joined with the remainder. This whole

(Testimony of W. G. Brown.)

area from Cape Disappointment had become one contiguous area. In the 1920 map the spit is still connected with the high land, with the lagoon directly South of Cape Disappointment.

The 1922 map shows that Peacock Spit had moved considerably to the Eastward, with a hook tending over towards Sand Island; there was a 22-foot channel, a little deeper between Sand Island and the spit; the spit has not changed, except Sand Island has cut away along Southwestern shore and there has been a recession Eastward of Sand Island, and during this period Peacock Spit has been extending towards Sand Island. In 1923 the sands of the spit had joined and the channel between Peacock Spit and Sand Island is becoming shallow. Peacock Spit is solidly joined with the high land and Sand Island is still receding. The beach on the West shore of Sand Island, on these various maps, varies; at times it is long and [219] sloping, and at other times abrupt, according to how fast it is receding. On the map, with a small scale like this, it is impossible to say just what the distance is, but generally these maps show an abrupt beach on the West and Southwest side of Sand Island, the side towards Peacock Spit. On the 1924 map, the spit is shown to have enlarged considerably. We can tell this growth by referring to the latitude and longitude points, which, on the 1923 map, are in the channel. In the 1924 map the spit is extended from the Westerly until now it is over 1000 feet Easterly

(Testimony of W. G. Brown.)

from that point towards Sand Island. On this map the spit is connected with Cape Disappointment. On the 1925 map, Peacock Spit shows a portion above high water, although the highest part is not connected directly with Cape Disappointment at the lighthouse, but does connect at the jetty. The channel between Peacock Spit and Sand Island is not materially changed, and Sand Island, I would say, is receding slightly.

The 1926 map shows practically the same condition. The channel is pushed right over against Sand Island. There are sands next to Peacock Spit, but detached at low water mark, and between these sands and Sand Island the soundings in the channel are from 16 to 20 feet deep, while between this detached portion and Peacock Spit no soundings are shown, so it is an extension of Peacock Spit. Peacock Spit is now nearly three thousand feet East of that point on 124-02 longitude. On this map Peacock Spit shows no area above high water.

On the 1927 map the high water line again appears on Peacock Spit. These maps do not purport to show the distance of the land above high water, or the depth of the water on land below low water, except where soundings are shown. The part of Peacock Spit detached at low water line, has extended on the 1927 map, still further east, and the sand appearing between this and the main Peacock Spit shows that they are practically all one body of sand. This is conclusively shown by the sound-

(Testimony of W. G. Brown.)

ings between the spit and Sand Island where we have 15, 13, 10 feet, and no soundings between Peacock Spit and the detached area. [220]

On the 1928 map Peacock Spit is still shown as being above high water. The detached sands to the Eastward are shown as similar but there are no soundings between the detached portion and Peacock Spit, while there are soundings showing 17 feet of water between these areas and Sand Island. Sand Island has in the last four or five years receded gradually to the Eastward.

The 1929 map shows a large portion of the spit is broken up, and for the first time soundings appear across it. The spit is now in seven or eight areas, above low water, with one area above high water, detached from the mainland, at Cape Disappointment. Sand Island has receded gradually to the Eastward of the latitude 46-16 and is bounded on the West by a channel of 14 or 15 feet.

In the 1930 map, a channel apparently exists between two portions of Peacock Spit, which is now very much more consolidated than the year before and there are no soundings in the crossing channel; apparently the channel is shoaler. A portion of Peacock Spit, down to low water line, has extended considerably to the East; it is now nearly 3400 feet East of our latitude and meridian point we have been working from. The soundings in the channel between the spit and the island now show less at certain points, although there is still 12 feet of

(Testimony of W. G. Brown.)

water at one point, and 8 at another. The shoalest crossing between Peacock Spit and Sand Island is 4½ feet. [221]

"The 1931, the spit, or the—yes, the spit, is about the same shape as it was the year before, but the detached portion above the high water line has disappeared and the portion above high water line attached to the Cape is very much smaller than it was before. The spit is wearing away somewhat to the westward, although not greatly from the last year—it was at that time about the same—but the channel crossing the spit shows no soundings at all, which would indicate that it was shoaler than the year before, both channels much shoaler.

"The 1932 shows the same condition, but there are no soundings shown in either channel. The channel between the point of the spit and Sand Island is now very narrow and extends so far to the east that apparently there must be a cut opened to relieve the water from Baker's Bay. It couldn't be maintained in its present condition very long. Now we have the end of the spit as over 5,000 feet, over a mile, beyond our latitude-longitude point, and Sand Island receding to the east.

"1933, the channel between the spit and the island has been choked up at the upper end, and at low water this portion of the spit is now connected with Sand Island. The soundings

(Testimony of W. G. Brown.)

across the spit are now shown on the middle channel that we have observed the last several years and now show depths, the shallowest 7 feet, 6 feet at one point, other surroundings up as much as 13 feet. All of the spit that was above high water line has at this period been flattened down until no portion of it was up 8 feet or more above low water. It had got to low water.

"Now, in 1934, we have—in 1934 the lower end of the spit has extended still farther to the east, and it is now—well, it is nearly a mile and a half,—it is a mile and a quarter, we will say, east of our meridian point.

Mr. HICKS: So the record may be clear, you are referring to these sands south of Sand Island, you are calling them "the spit", the ones that are attached to the island?

A. I am calling them "the spit". They are now attached to the island at one point, and that point in 1934 is not as—that juncture of the island is not as wide as it was the year before, in '33; it is narrower. That lagoon, as it has now become, still empties into the channel at the lower end. There is no part of the spit now shown as above high water line, except close in to the jetty, at the inner end of the jetty.

1935, this extreme southeasterly, east tip of the sands, which I should say are a part of Peacock Spit—they are now indicated here as

(Testimony of W. G. Brown.)

"sands"—has moved a little—I don't know whether it has moved any to the east or not, it is so near to what it was—apparently it has, moved eastward. The portion of Sand Island where these sands joined it has raised until a hook is shown there above the high water line. The rest of the sands comprising Peacock Spit, there's a small portion next to the jetty and a small area— no, it isn't so small, either, except on this small map; it is over a mile from east to west—there is a flat portion that is above highwater at this time, extending eastward from the Cape. Apparently there is a tendency of the sands to build to the south the last year or two, although one would have to compare that by measuring them. [222] It is very decidedly an extension to the south since 1933, though, both in '34 and '35, the sands extending south.

Q. (By Mr. Bowerman) Mr. Brown, will you locate as accurately as you can on the map the point where the Peacock Spit sands show a junction in 1933 with the Sand Island, and then compare that point with the—oh, say, 1920 map of Sand Island, and state whether or not the point—how far the point of junction is from the location of the western shore of Sand Island in the earlier map.

Mr. HICKS: Now, I object, Your Honor, to the use of the words "Peacock Spit sands", for the purpose of the record here. Let the witness

(Testimony of W. G. Brown.)

identify the sands he is going to use here and not use that term. It is confusing in the record.

The COURT: The question assumes——

Mr. HICKS: Yes.

The COURT: ——assumes the location of Peacock sands.

Mr. HICKS: Yes.

Mr. BOWERMAN: Just a minute,——

The COURT: Of course, if the witness testifies that he is familiar with and knows where Peacock sands is at and locates it, then the question is proper, but I think it is well taken at this time, because the witness has not himself located and stated that he knows where Peacock sands are located, and your question assumes that he does.

Mr. BOWERMAN: Well, I have this to be said in my favor, Your Honor, I have the authority of the United States maps. It is marked plainly on here "Peacock Spit".

The COURT: Marked on the map as such?

Mr. BOWERMAN: Up to 1932, I think, or such a matter.

Mr. HICKS: May it please the Court,——

Mr. BOWERMAN: Back to 1920 here, 1919 —not '18, but 1919, 1920, '21, '22, '23, '24,——

The COURT: Well, couldn't you modify your question and state "as shown from the map"? He would be then testifying from the map, unless he knows himself from independent

(Testimony of W. G. Brown.)

knowledge where Peacock Sand is at. If he does, you may inquire in the matter.

Q. (By Mr. Bowerman) Well, do you know where Peacock sands or Peacock spit is?

A. I was on the ground last in either August, the last of it, or early part of September.

Q. And over what period of time were you on the area designated on the map as "Peacock Spit Sands"? [223]

A. As long as we could stay for the tides.

Q. No, I mean back over what period of years?

A. Well, I was on the grounds in '29 and '30, and prior to that time I couldn't say, but I made frequent trips down there in connection with my work.

Q. What is that area that is marked on the map as "Peacock Spit" known locally down there as?

A. Well, it is known as Peacock Spit.

Q. Is that the local name for it?

A. That is the local name for it.

Q. And is that what it is generally known as on United States Engineers' maps?

A. Yes, and so designated on the maps since the wreck of the "Peacock".

Mr. HICKS: Now, for the purpose of the record, so that I may have this clear, you are referring to this consolidated body of sands which are connected with the mainland, are you not?

(Testimony of W. G. Brown.)

A. Sometimes connected and sometimes not. They are connected at certain depths, not always at high water or even at low water.

Mr. HICKS: You are not referring to the sands that have been cut through and broken up by storms, you are not referring to the sands east of that, as Peacock Spit?

A. Yes, I consider that channel simply a temporary channel, probably close up in a few years, and that the whole mass is Peacock Spit, subject to changes from winds and tides from year to year."

The junction of the sands which I have referred to as Peacock Spit shown on the 1932 map, or the point on the westerly shore line of Sand Island where this junction occurred, is about 2700 feet north of our meridian line and about 1500 feet easterly of where the westerly shore line of Sand Island was as shown on the map of 1920. That shows that there was a recession of the westerly shore of Sand Island from the area of high water of about 1500 feet easterly between 1920 and 1933.

Cross Examination

When I speak of a recession there of 1500 feet, I am referring to the cutting off of this nubbin which sticks out there from the westerly [224] side of Sand Island. I note the body of sands appearing on the 1879 map extending southerly from

(Testimony of W. G. Brown.)

Cape Disappointment which I have referred to as Peacock Spit. There are no soundings. I also note the large body of sand extending due west and projecting from Sand Island which would be a spit of the same character. I estimate it extends out a couple of miles. It is attached to Sand Island and circumscribes it on the westerly end. The progress of Sand Island northerly and westerly was completed in 1905 or prior thereto because the channel had been stabilized by the jetty. Since that time certain portions have moved to the north but at nothing like the rate at which it had been moving before that time. The more southerly ship channel is about in the same location that it was in 1908. It has of course deepened and widened. A considerable portion of Sand Island occupies the same location that it did in 1908. I was down in that section in 1929. I made some surveys at that time and I am familiar with the shifting character of the sands and spits in the estuary of the Columbia. A heavy storm changes channels and bodies of sand on short notice. Storms, such as they have during the winter months, may affect substantial changes. This could only be said relatively because of the smaller channels where there is no great amount of navigation. A normal winter storm, such as you referred to, and with reference to the situation shown on the 1929 map would be more apt to change shore lines than a channel. Where there is a lot of detached portions a storm might cause perhaps a shifting from one

(Testimony of W. G. Brown.)

side of a body of detached sands to another. I have seen heaving storms make changes during the two winters I spent there. The major channel don't change now. It did before the jetties. At times there were as much as a hundred million yards change in one year but that had to do with the bar. The sands more or less protected by the outer sands didn't change so much. The channels have not changed relatively nearly so much since the jetties were built as before. Comparing the map of 1928 with the [225] map of 1929 I find that, in 1928, there were small bodies of sand above high water not cut off and there were several detached portions. In 1929 it had flattened off. There are soundings in but one channel. It is the practice of the Army Engineers to chart any channel that could be used by boats. In 1929 the channel which had broken through Peacock Spit shows a maximum depth of 7 feet and a minimum of 4 feet. The channel between the Spit and Sand Island shows a maximum of 15 feet, in the middle 11 feet and at the upper end it gets down as low as 5 feet. The shape of Peacock Spit is substantially the same on the map of 1931 as on the map of 1930. There was some changing and cutting away and some consolidation of detached area. Comparing the map of 1930 with that of 1931 the channel lying immediately south and west of Sand Island and between it and the body of sands lying to the south had pushed eastward and had become shallower. I can't tell whe-

(Testimony of W. G. Brown.)

ther the same tendency is shown by the map of 1932. There are no soundings but the channel is narrower. The 1933 map shows that these sands to the south and west of Sand Island have jointed with Sand Island.

"Mr. HICKS: Yes. Now, you said something about the action that the waves and storms and currents have upon the shore lines of these islands and spits. Will you amplify that a bit more. What is the tendency there? What happens when a storm strikes one of these spits or shallow bodies of sands in this vicinity?

A. A heavy storm will sometimes blow up the sands and sometimes cut them down. It depends on the stage of the tide. On an ebb tide with a very heavy break on the bar, which does not now exist but did when I was down there, it would build these sands up materially, if the heaviest part of the storm was on the flow tide. If on the ebb tide it might carry that stuff out with it and leave quite a hole. You can't state that a storm will have a certain result. There's too many—the direction of the wind, the intensity of the wind.

Q. The wind has quite a bearing on the effects on the shore?

A. The wind makes the waves and the waves is what does the damage.

(Testimony of W. G. Brown.)

I observed at one time quite a piece of Sand Island being cut away, that is, the high water mark being pushed back, but later on in the springtime when I was over there there was a large beach developed there. Now, I couldn't say whether that [226] occurred at the same storm or later. You don't have any opportunity to watch those things. It might well be possible for the shore line of one of those spits to change as much as a hundred feet in the same storm. Anywhere along the beach I have seen great portions of land torn out and rebuilt. Wherever you have an alluvial soil or sand beach, during storms they are subject to change, and this condition is found in the entire region at the mouth of the Columbia River." [227]

HARRY PICE,

a witness for defendants, testified:

My home is in Astoria where I have lived for about 33 years. For the last few years I have been foreman on the seining grounds. Beginning in 1928, I was employed by the Columbia River Packers Association and afterwards by Columbia River Packers Association and Barbey. I became employed by both somewhere around 1929. As foreman I had charge of the seining grounds and the seining operations were drag seining. These seining

(Testimony of Harry Pice.)

operations were carried on on the south side of Sand Island, on the south side of what we call here Peacock Spit.

"Q. (By Mr. Clark) Perhaps you had better come down to the map, Mr. Pice, and that way we will probably locate more rapidly where your operations were being carried on in 1928. Here is Sand Island as outlined on this map, and here is what is outlined on the government map, designated on the government map, as Peacock Spit. Now, on which body of land were you carrying on seining operations?

A. Right in here, from the east end of this here, down here. (Indicating).

Q. Now, you put your finger on Peacock Spit as designated on this 1928 map, did you?

A. Yes, right here (indicating)."

These seining operations were carried on on the southwesterly side of Peacock Spit and out towards the easterly end (indicating). I should say somewhere about here (indicating). That is I figure about three thousand feet from the extreme end.

[228]

"Q. Well, now, you have got your finger on the eastern and southern end?

A. Yes.

Q. Then what direction from there?

A. Westerly.

Q. Yes, up along the spit?

A. Yes."

(Testimony of Harry Pice.)

The drag seines were laid out in the waters on the ocean side. There were buildings on the spit close to the seining operations, consisting of a fish dock, mess house and barn and other structures, in 1928. These buildings were about here (indicating) with reference to the fishing operations. They were located about the center of the sands. The dock extended from the sands into the channel between Peacock Spit and the Island. It was used for unloading supplies brought to the fishing operations and loading fish to be carried away.

In 1929 drag seine operations were carried on by Columbia River Packers Association on Peacock Spit, about where they were in 1928. The seines were laid out in the waters on the ocean side of the spit and we had buildings on the sands used in connection with the fishing operations.

In 1930 I had charge of the drag seine operations on the spit. These operations were carried on about here (indicating on map of 1930) and

"Q. You have located a point approximately where there is an area marked out by a heavy white line? [229]

A. Yes, sir.

Q. On the area marked 'Peacock Spit'?

A. Yes, sir."

Boats running between Astoria and Baker's Bay area during the years I have referred to used the channel between Sand Island and Peacock Spit and very close to Sand Island. I am referring to the

(Testimony of Harry Pice.)

channel shown on the 1930 map upon which depths were charted and which runs close up to Sand Island.

In 1931 I had charge of the drag seine operations which were carried on from the easterly end of the spit and running westerly along the spit. The seines were laid out in the waters and landed on the ocean side of the spit. There was a dock used in connection with the fishing operations which as nearly as I can remember was located a little south of the figures "5" and "6" in the channel between the sands and Sand Island. It was a dock which rested on piling and extended from Peacock Spit or the sands we have been talking about north into the channel between Peacock Spit and the sands. The dock was used to land supplies for the fishing operations and to carry away fish. The boats that came to the docks were what were called the fish carriers—about 60 feet long and about fourteen feet beam and were driven by gasoline engines. They have a draft of about eight or ten feet. These boats approached the dock through the channel between Sand Island and the sands upon which we are fishing. As a rule the boats came from Astoria and when loaded went back to Astoria. Some boats, of course, went through to Ilwaco on Baker's Bay. All the boats which came to our dock or went through from Astoria to Ilwaco used the channel which was between Sand Island and the sands upon which we were carrying on the fishing operations. [230]

I had charge of the drag seine operations in 1932 and

"Q. And where were they with reference to the drag seine operations of 1931?

A. A little higher up, easterly, more easterly.

Q. A little higher up, but more easterly?

A. Yes.

Q. On the same general body of sands?

A. Yes, the same body of sands."

We did not use a dock that was in connection with the fishing operations. The fish were taken away in scows. These scows would tie up to piling which were driven on the north side of the sands upon which we were fishing at a point approximately south of the letters "L" and "A" in the word "Island". The point at which the piling were driven was on the south side of the channel between Sand Island and the sands upon which the fishing operations were being carried on, and the scows reached these piling through that channel. The scows when loaded with fish were towed to Astoria.

I had charge of the drag seine operations in 1933 and

"Q. And where were they carried on with reference to the operations of '32?

A. Right in here (indicating), east end of—you see, we worked up every year more. The sands kept working easterly a little more.

Q. That is, the sands kept working easterly?

A. Yes, sir, somewhere about there (indicating).

(Testimony of Harry Pice.)

Q. Building up easterly?

A. Yes, sir.

Q. But did you work along these same sands? [231]

A. Yes, same sands.

Q. And I presume as usual you laid your seines out on the ocean side?

A. Yes."

The fish was gathered in scows the same as in 1932 and were tied up to the same piling as in 1932 which they reached through the same channel, as in 1932, between Sand Island and the sands upon which the fishing operations were being carried on.

I had charge of the drag seine operations in 1934 which were carried on in about the same place as in 1932, perhaps a little further easterly. In the meantime a dock had been constructed on these sands, on the north side of these sands or spit which would be on the south side of the channel between these sands and Sand Island. The dock extended from the sands or spit north into the channel in the direction of Sand Island. It was built on piling and used for the loading and unloading of boats. The boats that came to this dock in 1934 were small, about thirty-two feet long. They came into the channel at a point near the most westerly dike which extends out from the south shore of Sand Island, usually on half tide and then reached the dock through a channel which existed between Sand Island and the spit or sands upon which we

(Testimony of Harry Pice.)

were fishing. When the boats were loaded they went back out through the same channel and also towed the barges or scows out. The fishing operations in 1934 started about June 11 and were carried on until about August 25th. There were no drag seine operations during the fall seasons. It is customary to close down drag seine operations on August 25th of each year. In the spring we usually began somewhere around June 1st to the 10th, depending on the season. [232]

When the fish were landed on these sands in the drag seines, on the ocean side, they were hauled across the sands to the dock where they were loaded. An ordinary type of four wheel wagon drawn by one team of horses was used in the hauling.

In drag seining, one end of the seine would be staked to the land, and the other end, when it came back to land would be dragged up on the sand with horses.

The fish was hauled in a wagon across the sands to the dock after being landed on the ocean side of the beach. The distance in some years would be five hundred feet and some years a little more, and some years less. In 1934 we had about 84 men on the fishing operations referred to and about 32 head of horses.

Cross Examination of Mr. Harry Pice.

I was fishing for the Columbia River Packers Association in 1928 on what is shown on the map

(Testimony of Harry Pice.)

as Peacock Spit, from the easterly end down towards the westerly end. In 1928 Barbey Packing Company was fishing on Sand Island. Mr. Barbey had a separate operation on Sand Island. I can't say how far the Barbey Fishing operations on Sand Island was from the operation of the Columbia River Packers Association, of which I was foreman. I hardly think it was as much as two miles but I never measured it and it is hard to judge distances.

In 1929 Barbey was carrying on an independent operation on Sand Island. I know where the westerly dike is located. I wouldn't say whether the fishing operations carried on by Barbey, to which I have referred, were westerly of where the westerly dike was later constructed. [233] Barbey had two locations there, Sites No. 2 and 3 on Sand Island. They are the ones noted as Sites 2 and 3 on Plaintiff's Exhibit No. 3. The location of the Barbey operation was on Sand Island. It probably extended easterly and onto site 4. I am not able to say whether the 1929 Barbey operation was about a mile and a half from the operation with which I was connected because I never measured the distance.

In 1930 I was working for the Columbia River Packers Association on Peacock Spit and the fishing operation began about the easterly end of what is designated on the map as Peacock Spit and extended westerly along the south shore. It might

(Testimony of Harry Pice.)

have been a distance of a couple of thousand feet —some years it was shorter and some years longer. I think Barbey was fishing on Sand Island in 1931, I am not sure. I think there was only one operation in 1931.

"Q. Now, in 1931 where were the constructions up here on the main body of the island, if there were any? I mean up across from the channel there.

A. There wasn't any."

There was some piling driven in the sands on the north side of the sands which were used to moor scows. We did not carry the fish across the Island.

In 1928, as to the fishing operations carried on on Peacock Spit we received the fish on the south side of the spit and took them across the spit to the north side and from there through the channel to Ilwaco or to Astoria. It was the same in 1929. [234]

In 1932, the drag seine operations began to go farther to the east and by 1933 and 1934 we were fishing westerly from the last dike which had been constructed there. From 1930 on I was working for both the Columbia River Packers Association and the Barbey Packing Company. I know nothing about the Baker's Bay Packing Company.

In 1934, we went into the channel between Sand Island and the sands upon which we were fishing at about half tide because the channel was shoaling up a bit.

(Testimony of Harry Pice.)

The sands of which I am speaking south of Sand Island would not be flooded with water during high tide in the summer time. I should say about half would be flooded at high tide. We are not troubled in the summer with swells and very high tides. There would be no tides in the summer that would cover these sands. There were no tides in 1934 that covered the sands because we had buildings on there. I was on these sands until August 25, 1934. I have not been on them this year (1935).

Redirect Examination of Harry Pice.

During the fishing season of 1934, we kept the men and horses in the buildings on the sands.

"Q. You had buildings on the sand, and the horses were kept there?

A. Yes, a cook house and a barn.

Q. And the men were kept there, except when they went ashore Saturday night?

A. Yes." [235]

A. J. GOULTER

a witness for defendants, testified:

I live about three miles east of Ilwaco, Washington, where I have lived practically all my life. I run a ranch down there and furnish horses for seining purposes. I am acquainted with Mr. Barbey, also with Mr. Thompson of the Columbia River Pack-

(Testimony of A. J. Goulter.)

ers Association, and have furnished horses in connection with their seining operations.

I furnished horses in connection with their seining operations. I furnished horses in 1928 for the Columbia River Packers Association, probably about 80 head for use in drag seine operations. The first time I furnished any horses to Mr. Barbey was either in 1930 or 1931.

In 1928 I furnished horses for seining purposes to Columbia River Packers Association on the sands that were referred to by Mr. Pice. I furnished 32 horses for this operation. They were taken over to the fishing grounds in a scow. The scow went through the channel between the spit and Sand Island. I was at these fishing operations during the summer of 1928, during all of the time my horses were there. I refer to the drag seine operations of which Mr. Pice testified. The horses were kept in a barn on the sands. There was a dock. It was built on the spit extending out into the channel between the spit and Sand Island.

I furnished horses also in 1929. I also furnished about 32 horses to be used in the drag seine operation referred to by Mr. Pice. The operations began sometime in June and ended August 25th. The horses were kept on the sands in a barn. There was a dock used in connection with the operations which extended northerly into the channel between the spit and Sand Island. Fish carriers and other boats came to that dock through that channel. There was

(Testimony of A. J. Goulter.)

also located on the sands upon which the fishing operations were being carried on other buildings such as a cook house, bunk house, etc. The fish [236] were landed in nets on the ocean side of the spit and carried across the spit in wagons to the dock.

I furnished about the same number of horses during the same period for the operations in 1930. The horses were kept on the sands in the same way as in preceding years and there was a dock used in connection with the operations which extended from the spit northerly into the channel between the spit and Sand Island and this dock was approached by several boats which carried supplies to and fish away and these boats used the channel between the spit and Sand Island.

I also furnished horses for the fishing operations in 1931.

In 1932 the horses were kept in buildings on Sand Island. These buildings are on the north or Baker's Bay side of Sand Island and have been there quite a number of years.

The first buildings were put in there in 1921. The buildings were on the north shore of Sand Island and the point I have indicated as the location is approximately on a line drawn from the letter "d" in the word "Island", on the 1933 map, easterly to the figure "4" out in the waters north of the Island.

I furnished horses in 1933 for the fishing operations of which Mr. Pice spoke. This year the horses

(Testimony of A. J. Goulter.)

were kept on the sands on Peacock Spit. They had some scows that took them over.

In 1934 I also furnished horses for the seining operations of which Mr. Pice spoke. This year the horses [237] were kept during the operation in a barn on Peacock Spit. The bar was on the north side of the sands and they fished a little to the west and south. The fish when taken in the nets on the ocean side of the sands were carried this year as in previous years in wagons across the sands to the dock built from the sands north into the channel between the sands and Sand Island. Supplies reached the fishing operations by way of this dock. The channel I refer to is the one between Peacock Spit and Sand Island. Fishing operations in 1934 closed in August 25th.

I did not furnish any horses in 1925.

Cross Examination of Mr. A. J. Goulter.

When I furnished horses to Columbia River Packers Association in 1928 it was fishing Peacock Spit. I am not furnishing horses to Mr. Barbey for fishing operations on Sand Island at that time. I am not able to say how far the operation of Columbia River Packers Association on Peacock Spit was from the operation of Barbey on Sand Island. I never measured the distance. I could see the men working on Barbey operation. I am not able to say whether these two operations were as much as two miles apart. I should say maybe between one and one-half and two miles in 1928. Of course the distance varies. In 1929 Mr. Barbey was fishing the sites on Sand Island and the Columbia

(Testimony of A. J. Goulter.)

River Packers Association was fishing on Peacock Spit at the location that I have already described. [238]

I began leasing horses to the Columbia River Packers Association and Barbey combined either in 1930 or in 1931, I am unable to say which, but I was still furnishing horses for the operation on the spit as I had before.

> "Q. (By Mr. Hicks) In 1931 and '32, when you were furnishing horses for the companies combined, they were fishing the identical premises and the identical locations at that time that Mr. Barbey was fishing in 1928 while the Columbia River Packers Association were fishing away over on Peacock Spit; is that right?
>
> A. No.
>
> Q. Well, now you just explain the difference.
>
> A. Why, I don't think there were any operations carried on on Sand Island after '31. That is my recollection of them."

I know where the dikes are. I know where the westerly dike is. I furnished horses for the operation of Columbia River Packers Association on Peacock Spit in 1928.

In 1928 the Columbia River Packers Association were fishing off Peacock Spit and Barbey was fishing off Sand Island.

> "Q. (By Mr. Hicks) Well, you testified

(Testimony of A. J. Goulter.)

that the operation in 1928 of the Columbia River Packers Association was about between one and two miles from where Mr. Barbey was fishing at the same time.

A. That is—What? One and two miles from where?

Q. Between one and two miles, the way you put it, between the point where Mr. Barbey was fishing in '28 and where the Columbia River Packers Association was fishing during the same year. [239]

A. They were fishing on Sand Island and we were fishing on Peacock Spit laying down in front of Sand Island."

* * * * * * *

"Q. (By Mr. Hicks) Well, maybe I can make it more clear to you. I will ask you again if the premises that were fished by the combined companies in 1931 and '32 and '33,—I ask you if those premises were not the identical premises, as to the location on this map, that were fished by the Barbey Packing Company in 1928?

A. No, not the way I see it.

Q. Well, can't you look at the map there and point out any difference in the location?

A. Well, no, in 1928 the Barbey Packing Company was fishing Sand Island, land on Sand Island, and we were fishing on Peacock Spit."

* * *

(Testimony of A. J. Goulter.)

"Q. A drag seine operation, that is, the fishing operation, could never be carried on in one of the inner channels, is that correct?

A. Well, the drag seine operation is conducted where they can catch the fish.

Q. And they never catch the fish in one of these channels, do they?

A. In Peacock Spit we always fished on the south side."

I am not able to say whether any of the fishing operations on Peacock Spit and Sand Island were carried on in the waters of the channel. Wherever the fish is that is where they are going to fish of course. I do not know of any drag seine operation being carried on in one of the inner channels. I [240] have seen them fish behind spits. We fished on Sand Island behind the spit and landed inside the spit. In years gone by there were times when we landed on the inside of the spit and since 1928 there was a time when Peacock Spit overlapped Sand Island.

"Q. And the seines would not be dragged in this area, referring to the 1928 map, would not be dragged in the channel between Peacock Spit and Sand Island, would they?

A. No; they might lap in here a little bit, but not a great deal."

Redirect Examination.

In the fishing operations on Sand Island they might stay out in the channel between Sand Island

(Testimony of Christ Hansen.)
and the sands and land the seines on Sand Island in the Sand Island operation. [241]

CHRIST HANSEN,

a witness for defendants, testified:

I live at Chinook, Pacific County, Washington, where I have lived about 38 years. It is on the north side of Baker's Bay area. My occupation for a number of years has been fishing in the waters of the lower Columbia river including those in the vicinity of Sand Island and the areas marked on the map as Peacock Spit.

I know where the fishing operations of the Columbia River Packers Association and Mr. Barbey were carried on in 1934. I was at those operations once during July or the latter part of August. I reached the operation at that time in this manner: I took my gasoline boat and went over to the north side of Sand Island and tied up to a dock there and walked across the Island and then I had Mr. Goulter come across in a dinghy or small row boat to Sand Island and take me over to the spit where the fishing operations were being carried on. I landed on the spit close to the bunk house. I was there two or three hours. I noticed a body of water between Sand Island and the sands upon which these fishing operations were being carried on. At that time we called it a lake or lagoon. This lake

(Testimony of Christ Hansen.)

or lagoon is a part of the old channel which was between Sand Island and Peacock Spit or the sands upon which the fishing operations were then being carried on.

These sands were called Peacock Spit at the time I first fished on them in 1920-21.

Cross Examination.

Referring to the 1920 map I was on the sands known as Peacock Spit as early as 1919 or 1920 and in the Spring of 1920 and 1921. [242]

When I made the trip in 1934 to the Barbey and Columbia River Packers Association fishing operations, I went across from Sand Island to the sands upon which they were fishing in a small boat across a channel. I said it was about something like 60 feet wide. I couldn't say. The tide was out and it was low water at the time. It was in the afternoon, probably 2 or 3 o'clock in the afternoon. It could have been as late as 4 o'clock. I made no memo at the time. It was pretty good seining tide and I was figuring on I might get some fish. But I wouldn't say just what time it was in the afternoon. I know it was in the afternoon. The crew had just had their lunch but that is hard to go by as on the seining grounds they have lunch most any time of the day. It wasn't a low going out tide, it was a hold up tide at the time. I came in just about at low water. There was a small scow in there at the time. I did not see any salmon taken out of there

(Testimony of Christ Hansen.)

that year because I was only there once and at that time they were just going out fishing. When I came back from the seining grounds I had to again go across the channel of the lagoon to Sand Island and I got a man to put me across. There was a net rack, there must have been a dock and they were all on pilings. I wouldn't say as to the kind of buildings or whether there were any, because I don't recall. There was some kind of a floor construction on top of the piling. I was back there last week and saw some piling but did not see any dock. [243]

WAYNE SUOMELA,

a witness for defendants, testified:

I live at Ilwaco, Washington, where I have lived for about 39 years. Since 1928 I have been local agent of the Columbia River Packers Association at Ilwaco. In connection with my duties as local agent I have been many times at the fishing operations of Columbia River Packers Association.

In 1928 I made a number of trips to the fishing operations on Peacock Spit referred to by Mr. Pice, whom I know. I would go down there to find out how the fish were running and give an estimated report to the Astoria office. In making these trips I used a gill net boat for several years and during the last few years I have used a small boat with an outboard motor. The gill net boat is 27 or

(Testimony of Wayne Suomela.)

28 feet long and is power driven. I have been on the fishing operation described by Mr. Pice every year up to and including 1934. I recall where the channel was with reference to these fishing operations. It was on the northerly side of the sands or what we call Peacock Spit and between Peacock Spit and Sand Island. In my various trips down to the fishing operations I saw boats passing through the channel. The type of boat that they used to carry the fish away from these operations was a fairly good size cannery tender. It might have been between fifty and sixty feet in length. These boats would approach the dock through the channel between Sand Island and the sands to the south and west referred to as Peacock Spit and on which the fishing operations were being carried on. [244]

"Q. Now, in 1931, if you will approach this table where the maps are spread out—you will observe on this map there is but one charted channel westerly of Sand Island leading into the Baker's Bay area, and that is the channel between a body of sands and Sand Island. Those sands south and west of the channel referred to, are those the sands you referred to as Peacock Spit?

A. Yes, this here area in here (indicating).

Q. And do you know whether or not that was the only channel, so far as you have observed in 1931 and prior years, that was used by boats?

(Testimony of Wayne Suomela.)

A. By cannery tenders, yes.

Q. By cannery tenders. There is this cross-cut appearing across the spit in 1931, but it is not charted for 1931. Now, that is true of 1930. Now turn to 1932, and that channel between the sands and Sand Island is not charted on this map, neither is the cross cut channel; there is no channel charted that year in this area. Do you recall which channel was used by the boats that year in reaching the operations, carrying the fish off from the operations in 1932?

A. Between Sand Island and what was called Peacock Spit."

The sands that I have been referring to as Peacock Spit are those south of Sand Island. I have always heard them called and known as Peacock Spit and the channel I refer to is the channel between these sands that I have called Peacock Spit and Sand Island. It was used in 1932 and again in 1933. I observed that in 1933 there had been a juncture to the north of these sands with Sand Island and at this point to the north of the channel between these sands and Sand Island was closed up. However south of this juncture there still remained the channel [245] through which boats reached the dock on the sands and carried out fish. This channel led eastward or south eastward between the sands and Sand Island to a point about at the westerly dike.

The same condition prevailed in 1934.

(Testimony of Wayne Suomela.)

Cross Examination.

I have been agent for the Columbia River Packers Association since 1928 and am its agent now. I have talked some about this matter with the attorneys for the defendants and with Mr. Thompson and Mr. Barbey.

> "Q. Who was it told you to designate these sands lying south of Sand Island as Peacock Spit?
>
> A. I did, as I have always known them to be Peacock Spit."

I am 39 years old. When I was a small boy, according to history, there was a bunch of sands extending out from Cape Disappointment that was known as Peacock Spit. I have seen the breakers and I have seen the sands out from Cape Disappointment and I have heard them called Peacock Spit. Those were the sands I heard called Peacock Spit since I was a little boy and I have also heard them called that further on up the river as they extended further up.

I have never worked for the Barbey Packing Company. I didn't know that the Columbia River Packers Association by virtue of a lease from 1930 on were working the sands in dispute.

I am telling the court that the sands lying westerly of the dike and southerly of Sand Island were known to me through the years from 1930 on as Peacock Spit. I have never heard anybody call them Sand Island. I have heard that there were

(Testimony of Wayne Suomela.)

drag seine operations on Sand Island in [246] 1930, 1931 and 1932. I did not hear of any drag seine operations on Sand Island in 1933 and 1934. The drag seine operations on Sand Island in 1931 and 1932 were not on the area designated as Peacock Spit but were further east of them. Up in this territory (indicating). I know that there had been no drag seine operations in this territory that I have indicated on Sand Island since the dike was put in.

Redirect Examination.

I know that the two westerly dikes were not begun until 1933. [247]

W. C. BRUBAKER,

a witness for defendants, testified:

My home is in Portland where I have lived for about 25 years. For about 15 years my business or profession is aerial surveying, or photographic surveying from an airplane. I have done aerial photographing in the lower Columbia for Columbia River Packers Association, U. S. Engineers, Mr. McGowan, Mr. Welch and a few others.

Defendants' Exhibit 14 for identification was taken by me on July 10, 1928, at 11:50 A. M. at an elevation of about 3000 feet. It purports to show the sands off Clatsop Spit looking north, north off the South Jetty, shows Peacock Spit in the distance and Cape Disappointment and the North Jetty, and part of Sand Island.

(Testimony of W. C. Brubaker.)

Whereupon Exhibit 14 was received in evidence and the following is a copy.

> (It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court). [248]

The upper edge of the picture is approximately north, the right edge is to the east and the left to the west. The black line extending out westerly from Cape Disappointment is the North Jetty.

Defendants' Exhibit 15 for identification was taken April 19th, 1930, at 11:14 A. M. Whereupon said Exhibit was received in evidence and the following is a copy.

> (It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court). [249]

This picture shows principally the North Jetty, with the wreck of the Admiral Benson. This is what we call Peacock Spit, that is Sand Island, that is Cape Disappointment, that is Baker's Bay (indicating). The mouth of the river is over this way (indicating). That is the ocean (indicating). The lighter color represents open water.

Defendants' Exhibit 16 for identification was taken May 4, 1931, at 9:10 A. M. It purports to

(Testimony of W. C. Brubaker.)

show the North Jetty, Peacock Spit, Sand Island and also all of Baker's Bay in the distance. Whereupon Exhibit 16 was received in evidence and the following is a copy.

(It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court). [250]

This (indicating) is the North Jetty, Sand Island, Baker's Bay, some of the sands towards the south there, and the main channel comes through here, and this is what is known as Peacock Spit through here.

"The COURT: The ocean is over this way? A. Yes, sir; comes right around that sand there. The South Jetty is right in here like that (indicating)."

Defendants' Exhibit 17 for identification was taken on May 4, 1931, at 9:10 A. M. about the same time as the preceding picture but at a different angle. There was probably about a minute between the two shots. Whereupon Exhibit 17 was received in evidence and the following is a copy.

(It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with

(Testimony of W. C. Brubaker.)

the record on appeal for the convenience of the members of the Court). [251]

On the right side of the picture are some sands jutting out. They are Clatsop Spit and the South Jetty on the Oregon side. Down here on the left-hand corner is the North Jetty. The black area projecting out on the left-hand side of the picture is Cape Disappointment and the heavy black area further north is Fort Columbia on the north shore of the River. It is called Port Ellis, I believe, at that point. Right here (indicating) is what is known as Sand Island and here (indicating) is what is called Peacock Spit. Of course it is cut off there by a channel. That is the cutoff channel (indicating). That is the cutoff channel south and west of Sand Island.

Defendants' Exhibit 18 for identification was taken on May 4th, 1931, at about 9:10 A. M., about the time the two preceding pictures were taken. It is a closer up view and shows a smaller area.

Thereupon Defendants' Exhibit 18 was received in evidence and the following is a copy.

(It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court). [252]

This (indicating) is Cape Disappointment, and the Forts and lighthouse in there, and this (indi-

(Testimony of W. C. Brubaker.)

cating) is what they call Sand Island, Baker's Bay, and this (indicating) is what is known as Peacock Spit (indicating). It is that heavy area south and west of what I designated as Sand Island. The white fringe along the southerly and southwesterly margin of what I have designated as Peacock Spit are the breakers or the waves rolling up there, where they break and cause a foam. That area was above water at the time the photograph was taken, as was also that of Sand Island. That is true of the other pictures which show those sands.

Defendants' Exhibits 19-A, 19-B, 19-C and 19-D, for identification, consisting of four photographs joined together, were taken on October 1st, 1933, at about 5:11 P. M. They are joined together in such a way as to show a continuous picture or outline.

> (It is not practicable to here insert a copy of the Exhibit. The original Exhibit with two additional duplicates will be transmitted with the record on appeal for the convenience of the members of the Court).

There (indicating) is Cape Disappointment, this is Sand Island, here is Peacock Spit or the location of it, here are the same sands that are shown below the cutoff channel in the other pictures, the thin white line running out from the lower-right hand corner from Sand Island is the government dike. The clear area between what I have spoken of as

(Testimony of W. C. Brubaker.)

Sand Island and these sands to the south represent water. The whitish area to the north represents dry land and the other would be wet sand (indicating) and this area (indicating) between the white sands on what I have been referring to as Peacock Spit sands and Sand Island, represents wet sand.

And this, further north, represents open water [253] between San Island and Cape Disappointment and down here (indicating) is the cutoff channel.

Cross Examination.

I did not make the last pictures under instructions from the defendants. Most of the others I did. The instructions they gave me were just to photograph that area. Most of them were taken at low tide. Some of them we didn't take at low tide because we wouldn't get there at the exact time of low tide. I am not sure that any of them were at the extreme low tide We were trying to catch the low tide, but sometimes we missed it a few minutes. They were all taken at about the lowest tide we could find. I don't think I took any other pictures for the defendants under their orders. They may have bought some pictures that I accidentally took around there when the water wasn't at the lowest. I have not furnished a great number of pictures to the defendants. They have bought several, but hardly any more, I guess, than what has been exhibited here. In taking these pictures I took into account the condition of the tide and examined the tide tables. I did not take the pictures at the lowest tide during

(Testimony of W. C. Brubaker.)

the month. We took into consideration the weather and things of that kind, but not always the lowest tide during the month. We would look over the tides for the entire month and sometimes for the year. Sometimes about the only instructions I had was to note the exact time when I took them, get them at low tide and note the time, the hour and date. They were taken at practically the lowest tide, but not the extreme lowest tide. On May 4th when I took one series of pictures there was a zero tide. I haven't my tide book for that year. I am not sure just what the time was. I wouldn't say that any calculation was made to get the very lowest tide possible but we wanted the lowest. [254] Sometimes we would get it. below zero. I don't believe I have any pictures taken at high tide unless there were some taken away back in 1923 or 1924. These pictures in evidence some were taken in the Spring and some in the Fall. Those taken October 1st were taken almost at sundown. I may have flown over these sands and Sand Island at some time when the tide was in and I know about what it would be down there at high tide. Except the last few years there was always white sands out there, as I recall, even at high tide. I couldn't say how big the white sand area was, but I expect there would be a thousand feet square or so there, a kind of a round spot of white sand was out there at practically high tide, until probably the last few years it has been washed down pretty well. I wouldn't say that during the

(Testimony of W. C. Brubaker.)

past few years the area west of the channel, and which is known as Peacock Spit and those sands south of Sand Island are covered by water during high tide, but I think pretty near all of that area would be covered at this time at real high water. This is true only for the last year or so. From 1930 on if I were taking a picture at high tide I would in addition to seeing Sand Island and the mainland or Cape Disappointment and the Baker's Bay see quite a bit of an island out there, I think. I made some maps there last year for a Mr. McGowan and also nearly every year and I remember there is quite a bit of an island out there. Most of them were taken in the summer time. I couldn't say what percentage of the sand shown on the pictures taken at high tide. It would depend somewhat on what year. If you refer to the year 1933, it is hard to say just how big an area would be exposed at high tide. When there is a real low tide you will see river bottom practically. It depends on whether it is a real minus. It might be minus 1½ feet, and that takes in a lot of river bottom down there. I think more than 5% of the area you refer to would be exposed at high tide [255] at the time in 1933 when some of the pictures were taken. I have not taken any pictures in this year at high tide but I took some pictures last Monday for the U. S. Engineers when the water was 2 feet above zero. I do not have these pictures they were sent to the U. S. Engineers.

(Testimony of W. C. Brubaker.)

Redirect Examination.

All the pictures introduced in evidence were taken at the request of one or both of the defendants, except the group of four pictures fastened together which were taken in October, 1933. They were not taken at the request of either of the defendants.

Recross Examination.

The pictures taken a few days ago for the U. S. Engineers were sent to them last Tuesday.

Thereupon defendants offered, and there was received in evidence, Defendants' Exhibit 20, a lease theretofore referred to in the testimony of Mr. Clark and other witnesses, between the State of Oregon, acting by the State Land Board, as lessor, and Columbia Fishing Company, as lessee. The lease was executed November 27th, 1928, and the material provisions may be thus summarized:

(a) was for a term of five years;

(b) the State Land Board leased to Columbia Fishing Company for said term the lands surveyed by Mr. McLean in the Fall of 1928 concerning which he testified and which are described in Exhibit 9 and also embraced within the heavy red lines on the map of 1934 which is a part of Exhibit 1, some distance south of Sand Island;

(c) the rent reserved was 4 cents a pound on all food fish taken with drag seines landed on the leased property with a minimum annual payment of not less than $4250. [256]

Thereupon there was offered and received in evidence as Defendants' Exhibit 21, a lease bearing

(Testimony of W. C. Brubaker.)

date December 22, 1932, between the State of Washington, as lessor, and Baker's Bay Fish Company, as lessee, together with the assignment of an interest therein to H. J. Barbey, in words and figures as follows: [257]

"DEFENDANTS' EXHIBIT 21

THIS LEASE, made and entered into this 22d day of December, A. D. 1932, by and between the State of Washington, party of the first part, and Baker's Bay Fish Company, Ilwaco, Washington, party of the second part.

WITNESSETH, that for and in consideration of the sum of Five Thousand and no/100 ($5000.00) Dollars per year, to be paid to the Commissioner of Public Lands of the State of Washington yearly in advance, and in consideration of the covenants hereinafter contained, the State of Washington doth lease, demise and let unto the party of the second part that tract or parcel of tide land of the second class, situate in Pacific County, State of Washington, and described as follows, to-wit:

> That portion of the tide lands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon the southerly side of lot 4, section 9, township 9 north, range 11 west, W.M., including Peacock Spit, lying southeasterly of the Main Channel Range, as shown upon the United States Coast and Geodetic Survey Chart No. 6151 of the Columbia River.

(Testimony of W. C. Brubaker.)

This lease is issued under the provisions of Section 126 of chapter 255 of the Session Laws of 1927, and is subject to the grant of the above described tract to the United States, under the provisions of section 150 of said chapter 255, for the period of five (5) years from the date of this instrument.

As a further consideration the following covenants are mutually agreed to:

The payment of the above mentioned annual rent to the Commissioner of Public Lands of the State of Washington yearly in advance is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and if said annual rent shall not be paid on or before the date when due, this lease shall be null and void.

The State of Washington reserves the right to approve any assignment of the whole or any interest in and to the within leasehold.

The tide lands herein shall not be offered for sale except upon application of lessee, who shall have preference right to re-lease at highest rate bid; Provided, however, and these rights are conditioned that lessee shall keep this lease in good standing.

All improvements placed upon said land by the lessee, capable of removal without damage to the land, where the lease is yielded to the state prior to any application to purchase said land, may be removed by the lessee, or at his option may remain

(Testimony of W. C. Brubaker.)

on the land subject to purchase or hire, and this lease is granted according to the provision of an act relating to lease, etc., of state lands, approved March 16, 1897 (as amended by section 2 of an act approved March 13, 1899, and acts amendatory thereof and supplemental thereto). [258]

All piling or other improvements placed upon the above described tide lands shall attach to and become a part of the realty unless moved or sold under the provision of the said act relating to lease, etc., of state lands, approved March 16, 1897, and acts amendatory thereof and supplemental thereto within three years after termination by surrender or limitation of lease or re-lease.

No statutory right vested in lessee is waived hereby, and lessee expressly agrees to all covenants herein and binds himself or themselves for the payment of rent as hereinbefore set out.

(Seal of Com. of Public Lands)

THE STATE OF WASHINGTON

C. V. Savidge,

Commissioner of Public Lands

By: W. M. Duncan,

Assistant Commissioner of Public Lands

BAKERS BAY FISH COMPANY,

By: W. L. Thompson, Pres., Lessee

P. O. Address: c/o Barbey Packing Company, P. O. Box 449, Astoria, State of Oregon. [259]

Witnesses as to Lessee

A. H. Whittle

Geo. Perkin

(Testimony of W. C. Brubaker.)

ASSIGNMENT

(The Commissioner of Public Lands will not approve and enter any assignment unless lease be in good standing.)

For and in consideration of Twenty five hundred ($2500.00) Dollars in hand paid to the within lessee and assignor, he hereby assigns, sets over and transfers one half of its right, title and interest in and to the within and foregoing lease, unto H. J. Bar-

(State of Washington Seal)

bey of Astoria, Ore., and said assignee hereby binds and obligates himself to perform all the conditions

(Bakers Bay Fish Co. seal)

and covenants of said lease.

IN WITNESS WHEREOF, We have hereunto set our hands and seals this 28th day of December, A. D. 1932.

..... (SEAL)

Assignor

BAKERS BAY FISH COMPANY

By W. L. Thompson, Pres.

(SEAL)

H. J. Barbey, Assignee (SEAL)

Witnesses:

A. H. Whittle

Geo. Perkins

State of Washington, Approved Jan. 5, 1933

A. M. Duncan,

Assistant Commissioner of Public Lands

(Testimony of W. C. Brubaker.)

ASSIGNOR'S ACKNOWLEDGMENT

State of Oregon,
County of Clatsop.—ss.

I, Geo. Perkin, do hereby certify that on this 28th day of December, 1932, personally appeared before me W. L. Thompson, President of Bakers Bay Fish Company, to me known to be the individual described in, and who executed the within instrument, and acknowledged that he signed and sealed the same as its free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year in this certificate first above written.

GEO. PERKINS,
Notary Public in and for the State of Oregon.
Residing at Astoria, Oregon.

(Notary Seal)
Notary Public for Oregon
My commission expires March 6, 1933. [260]

Thereupon there was offered and received in evidence as Defendants' Exhibit 22 a certified copy of a lease executed by the State of Washington to the Baker's Bay Fish Company, dated May 7th, 1928, for a term of five years, and carrying an annual rental of $36,000.00 a year.

Said Exhibit 22 is identical as to description and all other terms with Exhibit 21 set out in extenso, supra, with the exception of the date, the term and

(Testimony of W. C. Brubaker.)

the annual rental reserve, which exceptions are stated above. No interest therein was assigned to H. J. Barbey. It is omitted from the record to avoid unnecessary repetition.

Thereupon there was offered and received in evidence Exhibit 23 which is a lease executed by the State of Washington to Baker's Bay Fish Company, dated June 1st, 1931, for a term of two years. As a substitute for Exhibit 22 which was terminated by mutual agreement because of economic conditions. The annual rental reserved in Exhibit 23 was $7500.00 a year.

The said Exhibit 23 is identical with Exhibit 21, set out in extenso, supra, except as to the term and the annual rental as stated above. No interest therein was assigned to H. J. Barbey. To avoid unnecessary repetition, said Exhibit 23 is omitted from the record. [261]

G. T. McLEAN

resumed the witness stand for further cross examination.

A tracing prepared by the witness was marked, for identification, Government's Exhibit 24.

"Q. (By Mr. Hicks) Mr. McLean, examine Government's Exhibit 24 for identification and state what that is.

A. That is a tracing on which it shows an unbroken pencil line, which has been traced from the map of 1920, of the mouth of the

(Testimony of G. T. McLean.)

Columbia River, showing the high water line of Sand Island on the west and southerly shore of Sand Island as it appeared on that map, and showing the high water line on the same westerly and southerly shore of Sand Island as it appeared on the map of the mouth of the Columbia River in 1934, and the courses representing the geographical locations which appear on those two maps appear on this map and are marked in degrees and minutes to correspond to the two maps for the purposes of locating the tracing on the two maps, and also at various points along these high water lines as lines drawn at approximate right angles to the water line, and these lines are marked with the letters from "A" to "J" inclusive; and in a table at the lower left-hand corner, entitled 'Movement of Shore Line.' is given in one column, under the heading of 'Section,' the designation of these various lines; in the second column, under the heading of 'Movement', is given the measurements of the movements along each one of these lines of the shore line between the two years; and in the third column, headed 'Direction', is given the approximate direction of the movement."

That shows the recession of the southerly and westerly shore line of Sand Island from the year 1920 to the year 1935. [262] It is not any more accurate than the figures I gave before but because this map or tracing shows the comparative con-

(Testimony of G. T. McLean.)

dition between 1920 and 1935 of all points along the westerly and southerly side of Sand Island it is more complete. The measurements given in my previous testimony covered, however, all of the years between 1920 and 1934. This last tracing shows only the comparison between the years 1920 and 1934. My recollection is that the maximum recession along that northerly part of the island was 5000.

"Q. Now, what is the amount of recession along that line shown by the document which you hold in your right hand?

A. That is a misstatement, in that the measurement from the basic point, the largest and longest measurement from the basic point, to the point of the island at which it was farthest away from that point was 5,000. That doesn't mean that the recession was five thousand. I wouldn't remember what the actual recession was, because there is an accumulation, you see, of all of the years from 1920 to 1934."

(As it is impracticable to include the said map or tracing in this statement, the original and two additional copies will be transmitted with the record on appeal, for use of the members of the Court).

Thereupon the original complaint in this suit was offered in evidence by plaintiff as Exhibit 25 and, omitting the formal parts, is in words and figures

(Testimony of G. T. McLean.)

as follows: (The map attached to said complaint as Exhibit A is identical with the 1934 map included in Exhibit 1 in this case and is therefore omitted to avoid repetition): [263]

GOVERNMENT'S EXHIBIT 25

COMES NOW the United States of America, by Carl C. Donaugh, United States Attorney for the District of Oregon, under the direction of the Attorney General of the United States, and for its cause of suit against the above-named defendants, alleges:

I.

That the boundaries between the States of Oregon and Washington are fixed as of the middle of the north ship channel of the Columbia River, by Act of Congress of February 14, 1859, 11 St. L. 383, Ch. 33, admitting Oregon into the Union, and said north ship channel passes between Cape Disappointment on the west and Sand Island on the east, and runs in a northerly direction and thence around Sand Island on the north in an easterly direction, which fact was well known to the defendants.

II.

That on the 21st day of October, 1864, the Legislative Assembly of the State of Oregon passed an act entitled:

> "AN ACT to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned.

(Testimony of G. T. McLean.)

"Section I. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow, between high and low tide, and also to Sand Island, situate at the mouth of the Columbia River in this state; the said island being subject to overflow between high and low tide."

That ever since the passage of said Act, plaintiff has been in the possession of said Sand Island and is now the exclusive owner thereof and entitled to the immediate and exclusive possession thereof. [264]

III.

That during all the times herein mentioned said Sand Island was located within the estuary of the Columbia River, United States of America, within Clatsop County, State of Oregon, and within the jurisdiction of this court.

IV.

That the said tract of land called "Sand Island" is located and described upon a certain official map and chart prepared by the War Department of the United States for the year 1933, which said official map and chart of said Sand Island showing the location thereof in the said Columbia River and within the State of Oregon, and also showing the location of the said Main North Channel of the

(Testimony of G. T. McLean.)

Columbia River is hereto attached marked "Exhibit A" and by reference made a part of this complaint, which said "Exhibit A" shows the location of said Sand Island to be east and south of the said North Ship Channel of the Columbia River.

V.

That the waters of the Columbia River adjacent to Sand Island are shallow and are frequented by salmon, and the beach or spit on the west and southwest end of Sand Island is peculiarly adapted to the drawing of seines and floating fishing gear, and said waters are immensely valuable for the purpose of seining for salmon.

VI.

That during all the times herein mentioned the defendant, Columbia River Packers Association was and now is a corporation, organized under the laws of the State of Oregon and engaged in the business of fishing for salmon, and owning and operating canneries, and the defendant Baker's Bay Fish Company is a subsidiary corporation of said defendant [265] Columbia River Packers Association, and all of the capital stock thereof is owned and/or controlled by said defendant Columbia River Packers Association, so that the said Baker's Bay Fish Company is the corporate agent of said Columbia River Packers Association.

VII.

That during all the times herein mentioned the

(Testimony of G. T. McLean.)

defendant, Baker's Bay Fish Company was and now is a corporation organized under the laws of the State of Washington, engaged in the business of fishing in the waters of the Columbia River hereinafter described.

VIII.

That on or about the 1st day of May, 1930, the defendants, H. J. Barbey and the Columbia River Packers Association, a corporation, leased from plaintiff for seining purposes only, for a period of five years, the land on the south side of Sand Island which is described as Sites Nos. 1, 2, 3, 4 and 5 in said lease, and which is well known to all of the defendants herein, and which is more particularly described and mapped in that certain cause of Strandholm v. Barbey, 144 Or. 705, 26 P. (2d) at page 48, to which reference is hereby made, and the same is hereby incorporated herein by this reference the same as if said descriptions were fully impleaded herein.

IX.

That defendants, after having occupied said Sand Island under the terms of said lease for two seasons, for the years 1930 and 1931, thereupon abandoned said lease and secured a cancellation thereof, but prior thereto and for the fraudulent purpose of securing the right to fish the aforementioned waters south and west of Sand Island within the [266] State of Oregon with drag seines, and to

(Testimony of G. T. McLean.)

drag said seines upon the banks of said Sand Island, without paying plaintiff for the privilege therefor, and well knowing that the said waters and the land upon which said seines would be drawn was in the State of Oregon and not within the State of Washington, fraudulently entered into a pretended lease with the State of Washington, through its said Commissioner of Public Lands, for certain lands which were described as "Peacock Spit", but which were in fact lands which lie between low water mark and high water mark on a spit wholly within the boundaries of the State of Oregon, and a part of said Sand Island.

X.

That said defendants have fished said premises for the years 1932, 1933 and 1934 and used plaintiff's property as aforesaid, without paying plaintiff any rental therefor and will continue to fish said premises to the irreparable injury of plaintiff, unless restrained by order of this Court.

XI.

That the defendants, H. J. Barbey and Columbia River Packers Association and Baker's Bay Fish Company operate four fish seines, each being over 1250 feet in length over said premises belonging to plaintiff, and take from plaintiff's said premises immense quantities of salmon, and drag said seines upon the beaches, i. e., the land between high and low tides, of said Sand Island, for the purpose of

(Testimony of G. T. McLean.)

taking fish; that in connection with said seining operations of said defendants, the said defendants keep on said Sand Island twenty-six or more horses and stable [267] said horses in buildings constructed by defendants on the main land of said Island.

XII.

That defendants have no right, title or interest in and to said premises and should be restrained by order of this Court from fishing said premises and occupying said premises.

WHEREFORE, Plaintiff prays a decree of Court as follows:

1. For an order of the Court directing the defendant, Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation, and H. J. Barbey to appear at a time fixed by this Court, and show cause why the said defendants should not be enjoined and restrained from trespassing upon the said premises set forth in the complaint herein and from seining said premises and the landing of fish thereon and using said premises for horses and men and carrying on said fishing and seining operations.

2. That upon a hearing of this cause the Court decree that the defendants herein, and each of them, have no right, title or interest in and to those certain premises lying in the Columbia River south and west of Sand Island, or south and east of the Main North Ship Channel of the Columbia River

(Testimony of G. T. McLean.)

as shown by the Government map of the year 1933, and that the Court enter a decree declaring that the said premises are wholly within the State of Oregon, and the property of the plaintiff herein and that the plaintiff is entitled to the immediate and exclusive possession thereof, and that the Court render a further decree restraining and enjoining said defendants, and each of them, from using said premises in the manner aforesaid. [268]

3. That the plaintiff recover of and from the defendants its costs and disbursements herein. [269]

It was then stipulated as follows:

That the photograph (Exhibit 14) was taken on July 10, 1928, at 11:50 A. M. and that low water on that day, in that area, would be at 12:05 P. M.;

That the photograph (Exhibit 15) was taken on April 19, 1930, at 11:14 A. M. and that low water on that day, in that area, would be at 11:25 A. M.; taken on May 4, 1931, at about 9:10 A. M. and on that day, in that area, low water would be at 9:28 A. M.;

That the photographs, four in number, jointed together to make up Exhibits 19-A, 19-B, 19-C and 19-D were taken on October 1, 1933, at about 5:11 P. M. and that low water on that day, in that area, was at 4:48 P. M.

(Testimony of G. T. McLean.)

Thereupon counsel for the government offered in evidence as Government's Exhibits 26, 27 and 28 the original complaint, answer and amended answer in case No. L 11901 brought in the District Court of the United States for the District of Oregon by the United States of America, as plaintiff and against Columbia River Packers Association and others, as defendants.

To which offer defendants objected as incompetent, irrelevant, immaterial, not proper rebuttal and have no tendency to prove any issue in this case.

Thereupon the court reserved ruling upon the offer, stating:

> "The COURT: Well, I haven't time to examine the pleadings offered. I will reserve ruling on the admissibility of those, and then when I finally dispose of the case I will rule on it then."

No ruling was made with respect to the offer before the disposition of the case, or thereafter, hence they are omitted from this statement. [270]

MR. W. C. BRUBAKER

was recalled sa a witness for the government and testified:

Direct Examination.

Government Exhibit 29, for identification, was taken by me at 1:15 P. M. on June 10, 1935, and

(Testimony of W. C. Brubaker.)

shows the area about Sand Island, Peacock Spit, North Jetty, Cape Disappointment and the district down there.

Government Exhibit 30, for identification, was taken at 1:14 P. M. on the same day. It is looking out over Ilwaco to the south showing Sand Island, the entrance to the Columbia, Cape Disappointment and all that area.

Government Exhibit 31, for identification, was taken by me at 1:16 P. M. of the same day. This shows Baker's Bay from over Fort Columbia, Sand Island, Peacock Spit and North Jetty and I guess the town of Ilwaco. I don't know whether this is Chinook or McGowan, on there. The pictures were taken by myself for the U. S. Engineers and accurately show the situation at that time. They were not retouched in any way. The state of the water at the time these pictures were taken was about 2.2 feet above low tide.

Cross Examination.

I took some other pictures for the government about the same time but they were around the south jetty and north jetty and didn't show up close. I didn't take any at a higher tide.

Exhibit 29 was taken on a tide of 2.2 ft. The mark or projection here (indicating) is the dike and here is the cutoff channel. It shows slight and I don't suppose it is very deep. Here is a little breaker in it (indicating), over to the southwest

(Testimony of W. C. Brubaker.)

of Sand Island is a body of clear water with a channel leading into it. That is about the location of the old channel that used to run up the southwest of the island. [271]

Exhibit 30 covers a much larger area and is therefore on a smaller scale. On the lower part of the picture is some structures leading out from the mainland which is the life saving station on Cape Disappointment. Here (indicating) are the sands that I referred to as Peacock Spit in connection with the other pictures introduced. They are all of those sands running down from Cape Disappointment.

On Exhibit 31 the sands are still there and most of them above the 2.2 ft. level of water. The light or white is sand and breakers. They are out towards the edge.

Exhibits 29, 30 and 31 were received in evidence.

(It is not practicable to here insert copies of the Exhibits. The original Exhibits with two additional duplicates of each will be transmitted with the record on appeal for the convenience of the members of the Court). [272]

After the Court handed down its opinion, the plaintiff duly served and submitted to the Court the following

Proposed Amended Findings and Conclusions:

(Heading omitted) [273]

The above-entitled cause came on regularly for trial in the above-entitled Court, Honorable Charles C. Cavanah, Judge of said Court, presiding, on the 11th day of June, 1935, the plaintiff, United States of America, appearing and being represented by Edwin D. Hicks, Assistant United States Attorney for the District of Oregon, and defendants, Columbia River Packers' Association, a corporation; Baker's Bay Fish Company, a corporation, and H. J. Barbey, appearing and being represented by A. E. Clark and Jay Bowerman, whereupon evidence, both oral and documentary, on behalf of the several parties was offered and received, the Court, having duly considered the evidence and arguments of counsel and being fully advised in the premises, now finds the following:

FINDING OF FACT No. 1.

That on the 21st day of October, 1864, the Legislative Assembly of the State of Oregon passed an Act entitled:

> "An Act to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned:"

That Section 1 of said Act provided as follows:

> "Section 1. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state,

and subject to overflow, between high and low tides, and also to Sand Island, situate at the mouth of the Columbia River in this state; the said island being subject to overflow between high and low tide."

That the said Sand Island has been for many years last past, and now is, located in the estuary of the Columbia River, near the mouth of said River, within the United States of America and within Clatsop County, State of Oregon, and within the jurisdiction of this Court. For a more complete and detailed description of said Island, reference is made to the maps and charts hereto attached and which form a part hereof and which show the approximate locations, with the sands abutting from the southerly shores thereof. [274]

For many years last past, save for the occupation of said premises under leases and licenses executed by plaintiff from time to time and save for the encroachment of the defendants as to the years 1933 and 1934 as hereinafter recited, plaintiff has held exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.

FINDING OF FACT No. 2.

The North Ship Channel of the Columbia River is an existent channel which takes a course westerly and northerly of Sand Island through Baker Bay

and proceeds thence southerly into the main or south channel of the Columbia River between the eastern shore of Cape Disappointment within the State of Washington and the westerly shore of Sand Island, and the said channel as so constituted marks the boundary line between the States of Oregon and Washington.

FINDING OF FACT No. 3.

That there is abutting from Sand Island a body of sands which forms the southerly and extreme southwesterly shore line of said Island and the same is subject to overflow between high and low tides. (See Exhibit "A", the map hereto attached). These sands have formed as accretions and additions to Sand Island through the normal processes of the waves, sands, tides and currents of the Columbia River, which said waves, sands, tides and currents have caused articles of sand and a certain sand bar and/or bars, situate during years previous to the south and west of Sand Island, to be broken up and shifted, to become attached to said Sand Island by a slow and imperceptible process; the said sands so formed constitute an accretion and an addition to Sand Island and form a part thereof.

The southerly and extreme southwesterly shore line of said Sand Island abuts upon and faces, without obstruction, the main body of the Columbia River and embraces the fishing sites and locations [275] hereinafter more particularly referred to as Sites No. 1, 2, 3, 4 and 5, respectively. (See plaintiff's Exhibit "B" hereto attached).

FINDING OF FACT No. 4.

That the waters of the Columbia River adjacent to Sand Island are frequented by salmon, and the sands abutting from the main land of said Sand Island along the southerly and extreme southwesterly shore are peculiarly adapted for use in the drawing of seines and floating of fishing gear, and the said sands have had at all times herein mentioned, and do now have, great value as sites and locations for the carrying on of fishing operations.

FINDING OF FACT No. 5.

That the Columbia River Packers Association, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

That the Baker's Bay Fish Company, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

FINDING OF FACT No. 6.

That on the 27th day of March, 1930, the defendants, H. J. Barbey and the Columbia River Packers

Association, defendants herein, leased from plaintiff, for seining and fishing purposes only, for a period of five years, certain fishing sites and locations styled as Sites Numbered 1, 2, 3, 4 and 5, which said sites embrace a continuous area along the southerly and extreme southwesterly shore of [276] Sand Island, more particularly described, as to their approximate location, upon the map hereto attached and made a part hereof, marked Exhibit "B"; that said defendants, and each of them, including the Baker's Bay Fish Company, after having occupied said Sand Island under the terms of the lease last above referred to for two successive seasons, to-wit: for the years 1930 and 1931, thereupon secured a cancellation thereof as of the 10th day of May, 1932; that thereafter, and during the fishing seasons of 1933 and 1934, the said defendants continued to use the said properties and sites for the carrying on of fishing operations, without authority, or lease, or license of and from the plaintiff and in defiance of plaintiff's right to absolute and exclusive possession of the said premises.

FINDING OF FACT No. 7.

That the defendants have threatened, and are now threatening, to enter upon the fishing sites and locations upon Sand Island embracing the sands situate along the southerly and extreme southwesterly shore of said Island, heretofore described, and to conduct fishing operations thereon, and unless said defendants, and each of them, are restrained by this Court from entering upon and repeating

the occupancy of said premises without right or authority as aforesaid, the said defendants will occupy the said fishing sites and locations for the fishing season of 1935 and succeeding years, to the irreparable injury and damage of plaintiff.

FINDING OF FACT No. 8.

That the defendants have no right, title and/or interest in and to Sand Island and the sands abutting therefrom and forming, a part thereof along the southerly and extreme southwesterly shore of said Island, and have never enjoyed rights or interests therein, save such as were obtained by said defendants by and under leases regularly entered into between the said defendants, or either or any of them, and the plaintiff, the United States of America; that said defendants should be restrained from fishing the said premises and occupying the same. [277]

FINDING OF FACT No. 9.

That plaintiff has no plain, speedy or adequate remedy at law.

And the Court, being fully advised in the premises, does find the following:

CONCLUSION OF LAW No. 1.

That the State of Oregon granted to plaintiff, United States of America, on the 21st day of October, 1864, an unqualified fee in and to Sand Island, which said Island was described in the Legislative Act granting said premises as follows:

"Section 1. There is hereby granted to the United States all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow between high and low tides, and also to Sand Island, situate at the mouth of the Columbia River in this state; the said island being subject to overflow between high and low tide."

That the said Sand Island is and for many years last past has been located within Clatsop County, State of Oregon, and within the jurisdiction of this Court; that for many years last past, save for the occupation of said premises under licenses and leases executed by plaintiff from time to time and save for the encroachment of defendants as of the years 1933 and 1934, as hereinafter recited, plaintiff has been entitled to the exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.

CONCLUSION OF LAW No. 2.

That the North Ship Channel of the Columbia River is an existent channel, which takes a course westerly and northerly of Sand Island through Baker Bay and proceeds thence southerly into the main or south channel of the Columbia River between the eastern shore of Cape Disappointment

within the State of Washington and the westerly shore of Sand Island; the said channel as so constituted marks the [278] boundary line between the States of Oregon and Washington.

CONCLUSION OF LAW No. 3.

That the Columbia River Packers Association, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

That the Baker's Bay Fish Company, defendant herein, was at all times mentioned herein with respect to the operations of said company, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and during said times has been engaged, among other things, in the business of fishing for salmon and operating salmon canneries.

CONCLUSION OF LAW No. 4.

That the sands abutting upon and from the mainland of Sand Island, and which form the southerly and extreme southwesterly shore line thereof, have formed as accretions and additions to Sand Island and are a part and parcel thereof, and the property of the United States of America. The southerly and extreme southwesterly shore line of Sand Island abuts upon and faces, without obstruction, the main

body of the Columbia River and embraces the fishing sites and locations described as Sites 1, 2, 3, 4 and 5, respectively, situate to comprise a continuous area along the southerly and extreme southwesterly shore of said Island and which are more particularly described, as to approximate location, by reference to the maps, styled Exhibits "A" and "B", attached hereto and made a part hereof.

CONCLUSION OF LAW No. 5.

That that certain lease or license granted by plaintiff to the Columbia River Packers Association, defendant herein, and H. J. Barbey, defendant herein, under date of March 27, 1930, and which by its provisions was to extend for a period of five years from the date of its execution, was legally valid and binding and permitted occupancy of the fishing sites and locations hereinabove defined by [279] said defendants up to and until the 10th day of May, 1932, when the same was legally cancelled; that thereafter and during the fishing seasons of the years 1933 and 1934, respectively, the occupancy of Sand Island and the fishing sites aforesaid, appurtenant thereto, by said defendants was without right and constituted a trespass upon said properties and a violation and encroachment upon the right of the United States to have and hold absolute and exclusive possession of said Sand Island.

CONCLUSION OF LAW No. 6.

That said defendants, and each of them, are without right, title or interest in and to Sand Island

or any part thereof, including the sands which have formed as accretions to said Island as aforesaid, and which embrace in part the fishing sites numbered 1, 2, 3, 4 and 5, respectively, heretofore more particularly described.

CONCLUSION OF LAW No. 7.

That the defendants have threatened and are now threatening to enter upon the fishing sites and locations upon Sand Island heretofore described and to conduct fishing operations thereon, and unless defendants are permanently restrained and enjoined from entering upon and conducting fishing operations upon said fishing sites and locations, the plaintiff herein will suffer irreparable injury and damage.

CONCLUSION OF LAW No. 8.

That a decree should be entered herein enjoining the said Columbia River Packers Association, Baker's Bay Fish Company, and H. J. Barbey, permanently inhibiting and restraining said defendants, and each of them, and all their officers and agents and employees, from entering upon or occupying Sand Island and any part thereof, including the sands abutting therefrom and which form a part thereof, as aforesaid, and which embrace the fishing sites numbered 1, 2, 3, 4 and 5, respectively, and which are hereinabove more particularly described. [280]

CONCLUSION OF LAW No. 9.

That plaintiff has no plain, speedy or adequate remedy at law.

CONCLUSION OF LAW No. 10.

That plaintiff is entitled to recover of and from the defendants its costs and disbursements incurred herein.

To all of which the defendants, and each of them, do hereby except and exception allowed.

Dated at Portland, Oregon, this ..... day of ....., 1935.

.....

District Judge. [281]

(EXHIBIT "A" mentioned in and attached to said proposed findings and conclusions is identical with Exhibit 5 received in evidence and hence is here omitted. No Exhibit "B" was attached).

Thereupon defendants duly served and submitted to the Court the following objections and exceptions to said proposed findings and conclusions, as amended. [282]

[Title of Court and Cause.]

Objections and Exceptions of Defendants to Proposed Findings of Fact and Conclusions of Law as Amended.

Come now the defendants, and object and except to the proposed Findings of Fact and Conclusions of Law as amended which were prepared and served by counsel for the plaintiff upon the defendants, as follows:

I.

To Finding of Fact No. 1 and particularly the following part thereof:

> "For a more complete and detailed description of said Island, reference is made to the maps and charts hereto attached and which form a part hereof and which show the approximate locations, with the sands abutting from the southerly shores thereof.
>
> For many years last past, save for the occupation of said premises under leases and licenses executed by plaintiff from time to time and save for the encroachment of the defendants as to the years 1933 and 1934 as hereinafter recited, plaintiff has held exclusive possession of Sand Island as holder of the unqualified fee and has so possessed the same as a military reservation of the United States, and said plaintiff is now the exclusive holder thereof and entitled to the exclusive possession thereof.",

for the following reasons:

(a) That the said Finding undertakes to describe Sand Island as claimed by the plaintiff, by referring to maps and charts attached to the proposed Finding. That there are no charts attached thereto. That there is what purposts to be a [283] map attached thereto, marked Exhibit A, which is an inaccurate, incomplete result of some partial and unfinished surveys as disclosed by the evidence.

(b) That said proposed Finding as to the de-

scription of Sand Island is so vague, indefinite and uncertain as to be incapable of understanding, determination or application to the facts in evidence or to the area in controversy.

(c) That said Exhibit A attached to the proposed Findings of Fact and Conclusions of Law as amended does not purport to exhibit conditions existing at the time this suit was brought or at any time prior thereto but insofar as it discloses conditions in the vicinity of Sand Island it relates to the year 1935 after the sands south and west of Sand Island and which constitute the premises in controversy, had through accretions built up and enlarged to a point of juncture with Sand Island.

(d) That said map is not complete, is the result of partial surveys and was prepared for the purpose of making it appear that the sands constituting the area in controversy had grown out from Sand Island rather than growing toward Sand Island.

(e) That the said map, Exhibit A, has no tendency to prove any issue in this case and no tendency to prove that the sands in controversy are accretions to Sand Island.

(f) Object and except to attaching to the Proposed Findings of Fact and Conclusions of Law, as amended, the said map, Exhibit A, or any other maps or charts which are referred to in said proposed Findings and Conclusions but not in anywise identified or attached, as hereinbefore stated, upon the ground that it would be unfair and improper to select a particular map or chart and attach the

same to [284] the proposed Findings of Fact and Conclusions of Law, as amended, there being many maps and charts in evidence showing the conditions from time to time and from year to year.

(g) That the proposed finding that plaintiff has been in the exclusive possession of Sand Island

> "save for the encroachment of the defendants as to the years 1933 and 1934"

is ambiguous, indefinite and uncertain, as what constitutes Sand Island in the meaning of this finding is undetermined except by vague reference to maps and charts which are not attached to the proposed findings and, furthermore, the recital

> "save for the encroachment of the defendants as to the years 1933 and 1934"

is wholly unsupported by the evidence and is directly contrary to the undisputed evidence.

II.

Object and except to the Proposed Finding of Fact No. 2 for the following reasons:

(a) That the description of the course of the North Ship Channel as it proceeds through and westerly from Baker's Bay is vague, indefinite and incapable of location, and is contrary to the evidence.

(b) It undertakes to find and fix the boundary line between the States of Oregon and Washington without the presence of either State in this case.

III.

Object and except to proposed Finding of Fact No. 3 for the following reasons:

(a) That the same is vague, indefinite and incapable of application to the evidence or to the area in controversy.

(b) Assuming that the sands referred to in said proposed [285] finding are the bodies of sand disclosed by the testimony, including the maps in evidence in this case, that the same is unsupported by and contrary to the evidence and contrary to law.

(c) That it undertakes to attach to and make a part of Sand Island the whole area southerly to the main or South Ship Channel of the Columbia River, which is far distant from Sand Island, contrary to the evidence and contrary to law.

(d) That the premises in controversy in this case are not at or near sites Nos. 1, 2, 3, 4 and 5, or either thereof.

(e) That no Exhibit B is attached to the Proposed Findings of Fact and Conclusions of Law, as amended, and there is no means of determining what is meant by Exhibit B, whether it is a map, plat, chart or other document, and therefore such reference is meaningless and should be deleted.

IV.

Object and except to proposed Finding of Fact No. 4 upon the ground that the same is wholly unsupported by and is contrary to the evidence.

V.

Object and except to proposed Finding of Fact No. 6, as amended, as follows:

(a) That the premises in controversy are not at, near or connected with sites Nos. 1, 2, 3, 4 and 5, or either thereof.

(b) That in said Finding the location of certain premises purport to be shown by a map said to be marked Exhibit B. That no map, chart or other document marked Exhibit B is attached to said Proposed Findings of Fact and [286] Conclusions of Law, as amended, or made a part thereof.

(c) That the sites numbered 1, 2, 3, 4, and 5 on Sand Island covered by a lease of March 27, 1930, extended only to low water mark on Sand Island and did not extend, as disclosed by the undisputed evidence in this case, to any areas below low water mark as aforesaid and did not extend to any of the premises in controversy in this suit, which premises do not now and never did constitute any part of Sand Island or any part of sites 1, 2, 3, 4 and 5.

(d) That the recital that defendants during the fishing seasons of 1933 and 1934 continued to use sites 1, 2, 3, 4 and 5 for the carrying on of fishing operations is unsupported by and contrary to the evidence, the undisputed evidence being that neither of the defendants used said sites or either thereof, for the purpose of carrying on any fishing operations after August 25, 1931.

VI.

Object and except to proposed Finding of Fact No. 7 for the reasons that the same is unsupported

by and is contrary to the evidence, that by the use of an alleged map of 1932 plaintiff is endeavoring to have this court take jurisdiction over and adjudicate rights concerning the lands and areas on the Washington side of the only charted channel into Baker's Bay as disclosed by later maps, and it is undertaking to deprive defendants as lessees of the State of Washington of what rights they may have under leases of lands in front of and lying on the Washington side of the North Ship Channel as it existed when this suit was brought and as it existed since this case was tried.

VII.

Object and except to proposed Finding of Fact No. [287] 8, as amended, for the reasons:

(a) That the recital that the defendants have no right, title and/or interest in and to Sand Island is outside the issues and meaningless for the reasons that the defendants have at no time claimed, either in the pleadings in this suit or otherwise, that they had any right, title or interest in or to said Island or any part thereof, and at all times expressly disclaimed any interest therein, and what is meant by the term "Sand Island" in this recital is left uncertain and undetermined.

(b) The recital that the defendants have no right, title and/or interest in the sands abutting upon said Sand Island and forming a part thereof along the southerly and southwesterly shore is also outside the issues and meaningless, as the defendants have not, either in the pleadings or otherwise,

claimed any right, title or interest in Sand Island or any sands which are a part thereof but on the contrary have expressly disclaimed any such interest, and what sands are referred to as abutting on Sand Island are left undescribed and undetermined.

(c) If by Sand Island and the sands abutting therefrom, it is intended to include the premises in controversy in this suit, the recital or finding is unsupported by the evidence and is contrary to the undisputed evidence which shows that there were no accretions to Sand Island on the southerly and westerly shore thereof during the past ten or fifteen years but that said shore line had eroded or receded and that the sand formations to the south and west had formed a juncture with Sand Island at certain points through accretion to said sands and not through accretions to Sand Island. [288]

(d) That, if said finding is intended to describe and embrace the premises in controversy in this suit, it is undertaking to find and adjudicate upon rights concerning lands and areas on the Washington side of the North Ship Channel into Baker's Bay and to determine the location of the North Ship Channel and the boundary line between the two States and is undertaking to deprive defendants, as lessees of the State of Washington, of such rights as they may have under leases from said State.

(e) It finds by inference that the defendants have been fishing on Sand Island and that they should be restrained from so doing, when by the

by and is contrary to the evidence, that by the use of an alleged map of 1932 plaintiff is endeavoring to have this court take jurisdiction over and adjudicate rights concerning the lands and areas on the Washington side of the only charted channel into Baker's Bay as disclosed by later maps, and it is undertaking to deprive defendants as lessees of the State of Washington of what rights they may have under leases of lands in front of and lying on the Washington side of the North Ship Channel as it existed when this suit was brought and as it existed since this case was tried.

VII.

Object and except to proposed Finding of Fact No. [287] 8. as amended, for the reasons:

(a) That the recital that the defendants have no right, title and/or interest in and to Sand Island is outside the issues and meaningless for the reasons that the defendants have at no time claimed, either in the pleadings in this suit or otherwise, that they had any right, title or interest in or to said Island or any part thereof, and at all times expressly disclaimed any interest therein, and what is meant by the term "Sand Island" in this recital is left uncertain and undetermined.

(b) The recital that the defendants have no right, title and/or interest in the sands abutting upon said Sand Island and forming a part thereof along the southerly and southwesterly shore is also outside the issues and meaningless, as the defendants have not, either in the pleadings or otherwise,

claimed any right, title or interest in Sand Island or any sands which are a part thereof but on the contrary have expressly disclaimed any such interest, and what sands are referred to as abutting on Sand Island are left undescribed and undetermined.

(c) If by Sand Island and the sands abutting therefrom, it is intended to include the premises in controversy in this suit, the recital or finding is unsupported by the evidence and is contrary to the undisputed evidence which shows that there were no accretions to Sand Island on the southerly and westerly shore thereof during the past ten or fifteen years but that said shore line had eroded or receded and that the sand formations to the south and west had formed a juncture with Sand Island at certain points through accretion to said sands and not through accretions to Sand Island. [288]

(d) That, if said finding is intended to describe and embrace the premises in controversy in this suit, it is undertaking to find and adjudicate upon rights concerning lands and areas on the Washington side of the North Ship Channel into Baker's Bay and to determine the location of the North Ship Channel and the boundary line between the two States and is undertaking to deprive defendants, as lessees of the State of Washington, of such rights as they may have under leases from said State.

(e) It finds by inference that the defendants have been fishing on Sand Island and that they should be restrained from so doing, when by the

undisputed testimony the defendants have not fished on Sand Island, or any part of Sand Island, and have not attempted to do so, since August 25, 1931.

VIII.

Object and except to all and singular the proposed Conclusions of Law, for the reasons:

(a) That they are not conclusions of law, but mere repetitions, sometimes in identical form and sometimes in different form, of the proposed Findings of Fact, as amended.

(b) That they are unsupported by and contrary to the evidence and to law.

(c) That they are unsupported by the Proposed Findings of Fact, as amended.

(d) For the further reason that the only decree which may be properly entered in this suit is a decree dismissing the bill of complaint and the suit.

These objections and exceptions are filed without in anywise waiving the objections and exceptions heretofore filed to the Findings of Fact and Conclusions of Law served upon counsel for defendants some days prior to the service [289] upon them of the Proposed Findings of Fact and Conclusions of Law, as amended.

JAY BOWERMAN
A. E. CLARK
Attorneys for Defendants. [290]

Thereupon and after consideration of the foregoing, the Court made, filed and caused to be entered the findings, conclusions and decree which were entered in this suit.

CLARK & CLARK,
JAY BOWERMAN,
Attorneys for Defendants-Appellants.

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due and timely service of the foregoing Statement of the Evidence and Trial Record is hereby admitted at Portland, Oregon, this 31st day of October, 1935, by receiving a copy thereof, duly certified to as such by A. E. Clark of Attorneys for Defendants-Appellants.

CARL C. DONAUGH,
Attorneys for Plaintiff-Respondent.

State of Oregon,
County of Multnomah,
District of Oregon—ss.

Due and timely service of the foregoing Statement of the Evidence and Trial Record, together with receipt of a copy thereof, duly certified as such by A. E. Clark, one of the attorneys for defendants-appellants, is hereby admitted at Portland, Oregon, this 31st day of October, 1935, and any other or further notice of the filing and lodging of said statement and record with the clerk of the above named court is hereby waived and consent given that said

statement may be changed, modified and approved in its present form or as changed and modified without further notice to the State of Oregon.

I. H. VAN WINKLE,
Attorney General of the State of Oregon.
RALPH E. MOODY,
Assistant Attorney General,
Attorney for the State of Oregon.

Due and timely service of the attached Statement of evidence lodged by defendant with the clerk of the above court on October 31st, 1935.

G. W. HAMILTON,
Attorney General of the State of Washington.
R. G. SHARPE,
Assistant Attorney General of the State of Washington,
Attorneys for the State of Washington. [291]

IT IS AGREED that the foregoing statement of the evidence and trial record is proper and consent is hereby given to the approval, allowance and settling thereof by the Court forthwith.

Dated this 16th day of November, 1935.

UNITED STATES DISTRICT ATTORNEY.
EDWIN D. HICKS,
Solicitor for Plaintiff.
ALFRED E. CLARK,
M. H. CLARK,
JAY BOWERMAN,
Solicitors for Defendants. [292]

This is to certify that the foregoing statement of evidence and trial record is hereby allowed and approved and, together with the exhibits hereinafter referred to, declared to contain a statement of all the evidence and of the trial record in said cause bearing upon the questions involved on appeal in said cause, and that portions of said evidence which appear in the exact words of the witnesses are so reproduced, at the request of one or the other of the parties to this cause, and by direction of the Court, in order to properly present the effect thereof. The Court has by separate order identified as having been received in evidence and made a part of the record on appeal exhibits marked "Government's Exhibits 1, 2, 3, 5, 6, 24, 25, 29, 30 and 31" and "Defendants' Exhibits 8, 9, 14, 15, 16, 17, 18, 19-A, 19-B, 19-C, 19-D, 20, 21, 22 and 23" and said statement of the evidence and trial record is hereby ordered filed as the statement of the evidence and trial record to be included in the record on appeal in the above-entitled cause, as provided in Equity Rule No. 75.

Dated this 18th day of November, 1935.

CHARLES C. CAVANAH,

Judge of the United States District Court for the District of Oregon, presiding in the above-entitled cause.

[Endorsed]: Filed November 19, 1935. [293]

AND AFTERWARDS, to-wit, on the 22nd day of November, 1935, there was duly filed in said Court, a SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT, in words and figures as follows, to-wit: [294]

[Title of Court and Cause.]

SUPPLEMENTAL PRAECIPE FOR TRANSCRIPT.

To the Clerk of the Above-Entitled Court:

You will please prepare and certify as a part of the record on appeal in this cause, for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, in addition to the papers, files and documents specified in the Praecipe for Transcript heretofore filed, the following additional papers which have been filed since said former Praecipe was filed:

(1) The Opinion of the court made and entered prior to the entry of the Findings of Fact, Conclusions of Law and Decree.

(2) Stipulation between the defendants and the State of Oregon relating to Plaintiff's exhibits 1, 5, 6, 24, 29, 30 and 31 and Defendants' exhibits 14, 15, 16, 17, 18, 19-A, 19-B, 19-C and 19-D.

(3) Stipulation between the defendants and the State of Washington relating to Plaintiff's exhibits 1, 5, 6, 24, 29, 30 and 31 and Defendants' exhibits 14, 15, 16, 17, 18, 19-A, 19-B, 19-C and 19-D. [295]

(4) Order based on the two foregoing stipulations.

(5) Stipulation that original exhibits be retained in the custody of the Clerk of the above entitled court at Portland, for use of the parties in the preparation of their briefs, etc.

(6) Order based on said stipulation.

(7) This Supplemental Praecipe.

Dated November 21st, 1935.

CLARK & CLARK and
M. H. CLARK,
JAY BOWERMAN,
Solicitors for Defendants-Appellants. [296]

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due service of the within Supplemental Praecipe for transcript is hereby accepted in Multnomah County, Oregon, this 21 day of November, 1935, by receiving a copy thereof, duly certified to as such by M. H. Clark, of Solicitors for Defendants-Appellants.

EDWIN D. HICKS,
Of Solicitors for Plaintiff-Respondent.

District of Oregon,
State of Oregon,
County of Multnomah.—ss.

Due and timely service of the attached defendants' and appellants' supplemental praecipe for transcript of record, by receipt of a true copy thereof, certified to be such by M. H. Clark, one of attorneys for defendants-appellants, is hereby acknowl-

edged at Portland, Oregon, this 21st day of November, 1935.

I. H. VAN WINKLE,
Attorney General of the State of Oregon.
RALPH E. MOODY,
Assistant Attorney General of the State of Oregon,
Attorneys for the State of Oregon.

Due and timely service of the attached Defendants' Supplemental praecipe for transcript of record by receipt of a true copy thereof, acknowledged this 21st day of November, 1935.

G. W. HAMILTON,
Attorney General of the State of Washington.
R. G. SHARPE,
Assistant Attorney General of the State of Washington,
Attorneys for the State of Washington.

[Endorsed]: Filed November 22, 1935. [297]

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 4 to 297, inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause then pending therein, numbered in said court E-9471, in which the United States of America is plaintiff and appellee, The Columbia River Packers' Association, a corporation, Baker's Bay Fish Company, a corporation, and H. J. Barbey, are defendants and appellants, The State of Washington, is petitioner and appellee, and The State of Oregon is petitioner and appellee; that the said transcript has been prepared by me in accordance with the praecipe and supplement praecipe for transcript filed by said appellants, that the same has been by me compared with the original thereof, and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe and supplement praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $47.75, and that the same has been paid by the said appellants.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 27th day of November, 1935.

[Seal] G. H. MARSH, Clerk. [298]

[Endorsed]: No. 8055. United States Circuit Court of Appeals for the Ninth Circuit. Columbia River Packers Association, a corporation, Baker's Bay Fish Company, a corporation, and H. J. Barbey, Appellants, vs. The United States of America, The State of Oregon, and The State of Washington, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed November 29, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8055

In the

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA RIVER PACKERS ASSOCIATION, a corporation; BAKER'S BAY FISH COMPANY, a corporation, and H. J. BARBEY,

Appellants

vs.

THE UNITED STATES OF AMERICA

Appellee

Appeal from the District Court of the United States for the District of Oregon.

Brief of Appellants

ALFRED E. CLARK
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Portland, Oregon
Attorneys for Appellee

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No. 8055

In the

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA RIVER PACKERS ASSOCIATION, a corporation; BAKER'S BAY FISH COMPANY, a corporation, and H. J. BARBEY,

Appellants

vs.

THE UNITED STATES OF AMERICA

Appellee

Appeal from the District Court of the United States for the District of Oregon.

Brief of Appellants

The questions involved and how they arise may be thus summarized:

1. Are Oregon and Washington indispensable parties to this suit?

The question arises on the pleadings (Tr., pp. 5, 13, 14, 20, 23, 24, 26, 27); the petitions of Oregon and Washington for leave to intervene and denial thereof (Tr., pp. 92 et seq.); the evidence which dis-

closed the interest of each of the States (Tr., pp. 198 to 217, 293, 294 to 299, 305-306); Findings of Fact Nos. 1, 2, 3, 6 and Conclusions of Law Nos. 1, 2, 4, 6 (Tr., pp. 47 to 56), and the decree in accordance with said Findings that appellee was the owner of the premises in controversy, that the same were accretions to Sand Island, and fixing and establishing the boundary line between the two States (Tr., pp. 60, 61, 62); and Assignments of Error Nos. III, XVII, XVIII, XIX, XXII to XXVII (Tr., pp. 70, 71, 72, 73).

2. Did the Court err in refusing to enter a decree of dismissal because of absence of indispensable parties, and because the evidence wholly failed to establish that appellee is the owner of the premises in controversy?

This question arises on the pleadings, the Findings of Fact and Conclusions and Decree, supra, and Assignments of Error Nos. XXII, XXV, XXVI, XXVII (Tr., pp. 72, 73).

3. Did the Court err in denying the petition of the State of Oregon, and the petition of the State of Washington, for leave to intervene?

This question arises upon the pleadings, supra, the order and opinion of the Court (Tr., pp. 92, et seq), the decree (Tr., p. 62), the evidence and Assignments of Error Nos. XXII, XXIII, XXIV, and XXVI (Tr., p. 72).

4. Did the Court err in finding and fixing the boundary line between the two States?

This question arises upon the pleadings, supra, Finding of Fact No. 2, and Conclusions of Law No. 2 (Tr., pp. 48, 54), and the decree in accordance therewith (Tr., pp. 60, 61), and Assignments of Error Nos. I, III, VI, XVII, XVIII, XXVI (Tr., pp. 66, 67, 68, 70, 71, 72).

5. Does the evidence sustain the Findings and Decree that appellants were trespassing, or threatening to trespass upon any property of appellee, or that appellants were trespassing or threatening to trespass upon the premises in controversy, whether they belonged to appellee or to someone else?

The question arises on the pleadings (Tr., pp. 13, et seq.); the evidence later discussed, Findings of Fact Nos. 1, 2, 3, 6, 7, 8, and Conclusions of Law Nos. 1, 2, 4, 5, 6, 7, 8 (Tr., pp. 48 to 57), and the Decree (Tr., pp. 60, 61, 62), and Assignments of Error Nos. I to VI; IX to XIV, XXI, XXVIII (Tr., pp. 66 to 73).

6. Does the evidence sustain the Findings, Conclusions and Decree that appellee is the owner of the premises in controversy and that the same are accretions to Sand Island?

This question arises on the pleading (Tr., pp. 5 et seq., 13, et seq), the evidence discussed hereafter, Findings of Fact Nos. 1, 2, 3, 6, 7, and Conclusions of Law Nos. 1, 2, 3, 4, 5, 6 (Tr., pp. 47 to 56), the Decree (Tr., pp. 60, 61), and Assignments of Error I to VI, XIV, XVI, XVII, XVIII, XIX, XXV (Tr., pp. 66, 67, 68, 70, 71, 72).

STATEMENT OF THE CASE

The complaint filed by appellee alleged that appellee was the owner of Sand Island in Oregon, in the lower Columbia River (Tr., pp. 6, 7), and prayed a decree that

> "plaintiff is the owner and entitled to the immediate and exclusive possession thereof, and that the court render a further decree restraining and enjoining the said defendants, and each of them, from using said premises in the manner aforesaid, or at all; that plaintiff recover of and from defendants its costs and disbursements incurred herein." (Tr., pp. 10, 11).

Attached to the original complaint was a plat which, it was alleged in the complaint, delineated

the premises which appellee claimed was Sand Island. The premises thus claimed included a large body of land, 150 to 200 acres, lying southerly and southwesterly of Sand Island. The only controversy in the case was whether this body of land, all above low water and part above high water at all times, belonged to the State of Washington or to the State of Oregon, or part to each, or was an accretion to Sand Island, and thus belonged to appellee.

The original complaint was filed August 15, 1934. An amended complaint was filed about a month later and to this amended complaint an answer was filed by appellants on October 9, 1934 (Tr., p. 13). On June 10, 1935, the day before the trial began, appellee filed a second amended complaint (Tr., p. 5). It was stipulated that the answer to the first amended complaint should stand as the answer to the second amended complaint (Tr., p. 95), and an order to this effect was entered (Tr., p. 12).

The answer admitted, what was never denied by any one, that appellee owns Sand Island under grant from the State of Oregon, made by the Act of the Legislative Assembly of October 21st, 1864, denied that the map attached to the original complaint, and referred to in each amended complaint, accurately shows the main, middle or north ship channel of the Columbia River, and

"extending south and southeasterly from Cape Disappointment is a body of land commonly referred to as Peacock Spit; that said Peacock Spit extends to a point west and south of Sand Island, is not a part thereof, but is now, and for many years last past was, a body of land having no connection with and constituting no part of Sand Island (Tr., pp. 13, 14).

* * * *

"* * * In this connection, the defendants allege that what the plaintiff in truth and in fact complains of in the amended complaint, and what it in terms alleged and complained of in the original complaint herein, was that the defendants under what purported to be a lease of a part of Peacock Spit from the State of Washington, and which was a lease lawfully entered into, the defendants were fishing said part of Peacock Spit described in the lease from the State of Washington, the plaintiff asserting in said original complaint, what in truth and in fact it seeks to assert in the amended complaint, that that portion of Peacock Spit leased to the defendants as aforesaid by the State of Washington, is in fact within the State of Oregon. The situs of fishing operations of which the plaintiff complains is not on Sand Island but on Peacock Spit (Tr., p. 18).

* * * *

"In May, 1928, the defendant, Baker's Bay Fish Company, leased from the State of Washington, for fishing purposes, certain parts of Peacock Spit, being the identical area embraced within the lease which said defendant now has with the State of Washington. On or about

June 4, 1931, said lease was cancelled by the State of Washington and said premises reappraised and a lease thereon was offered at public auction to the highest bidder, and said premises were again leased to defendant, Baker's Bay Fish Company, by the State of Washington for a period ending in December, 1932. Thereafter, and on December 22, 1932, the said premises were again leased to defendant, Baker's Bay Fish Company, by the State of Washington. That attached hereto, marked Exhibit A and made a part of this answer, is a true copy of the lease last referred to, bearing date December 22, 1932 (Explanation, see Exhibit 21 Tr., p. 294). That said lease is still in full force and effect. On December 28, 1932, defendant, Baker's Bay Fish Company, assigned and transferred unto the defendant, H. J. Barbey, a half interest in said lease, which transfer was consented to and approved by the State of Washington on January 5, 1933. Said lease is the identical lease referred to in Paragraph IX of the original complaint herein, wherein it was alleged that the defendants

> 'fraudulently entered into a pretended lease with the State of Washington, through its said Commissioner of Public Lands, for certain lands which were described as "Peacock Spit", but which were, in fact, lands which lie between low water mark and high water mark on a "spit" wholly within the boundaries of the State of Oregon, and a part of Sand Island.'

"That said premises so leased from the State of Washington are the premises upon which the defendants have been carrying on the fishing operations referred to in the original

> complaint, and in the amended complaint, and said fishing operations have been confined entirely to the premises described in said lease. The premises upon which the defendants keep horses and maintain structures, referred to in Paragraph XI of the original complaint, and Paragraph IX of the amended complaint, are the premises described in said lease with the State of Washington (Tr., pp. 19, 20)."

The answer further pleaded among other things, that the States of Washington and Oregon were indispensable parties to the suit (Tr., p. 27).

It will be observed that the answer set up various leases made by the State of Washington to one or more of the appellants at different times. The first lease here material was dated May 7, 1928, for five years, annual rental of $36,000.00, and was executed by the State of Washington to Baker's Bay Fish Company, one of appellants (Defts.' Ex. 22, Tr., p. 298). After this lease had run for three years, it was cancelled by mutual agreement, because of change in economic conditions, and another lease executed by the State of Washington to Baker's Bay Fish Company for a term of two years, dated June 1, 1931. The annual rental was $7500.00 a year (Defts.' Ex. 23, Tr., p. 299). An interest in this lease was assigned by Baker's Bay Fish Company to the other appellants.

On December 22, 1932, the lease dated June 1, 1931, was terminated by mutual consent, and

another lease executed by the State of Washington to Baker's Bay Fish Company for five years, at an annual rental of $5000.00 (Defts.' Ex. 21, Tr., p. 294). An interest in this lease was assigned to the other appellants. Under these leases up to and including 1934, the appellants had paid the State of Washington as rentals about $133,000.00.

The leased premises in these leases were identical and were described as situated in Pacific County, Washington, and being

> "That portion of the tide lands of the second class, owned by the State of Washington, situate in front of, adjacent to or abutting upon the southerly side of Lot 4, Section 9, Township 9 north, Range 11 west, W. M., including Peacock Spit, lying southeasterly of the Main Channel Range, as shown upon the United States Coast and Geodetic Survey Chart No. 6151 of the Columbia River."

The Court will readily see, upon an examination of the maps for 1928, 1929, 1930, 1931 and 1932, the years when these several leases were executed, just what was meant by Peacock Spit lying southeasterly of the Main Channel Range. These maps are a part of Government's Exhibit No. 1.

The original complaint filed in this suit on August 15, 1934 (Tr., p. 306, Govt.'s Ex. 25), as we construe the allegations of Paragraph IX, clearly identified the premises described in these several

leases as the premises in dispute in this suit.

It is, therefore, apparent that appellee, at the time this suit was brought, and for some time prior thereto, knew that the State of Washington claimed the premises in controversy and for a number of years had leased them and collected large rentals.

The answer, for the purpose of showing the interest of the State of Washington, its claim of title, and exhibiting the reasons why it was an indispensable party, further alleged that the courts of Washington had for many years assumed jurisdiction over the premises covered by said leases, and cited the cases (Tr., p. 23); also the opinion of the Attorney General of the United States, given on March 20, 1925 (Op. Atty. Gen., Vol. 34, pp. 428-435), to the effect that Peacock Spit was in Washington, that that state might legally permit fishing upon and in the vicinity thereof and upon all other tide lands lying within one and one-half miles of the southerly point of Cape Disappointment (Tr., p. 24). It was also alleged that in 1930, the United States, as trustee for certain Indian tribes, brought two suits in the District Court of the United States, for the Western District of Washington, Southern Division, one against appellant, Baker's Bay Fish Company, lessee of the State of Washington, and another against McGowan, in which Baker's Bay Fish Company intervened. In each of these suits

it was alleged by the United States that the premises leased by the State of Washington to Baker's Bay Fish Company, which lease covered the premises in dispute in this suit, were located in the State of Washington.

The claim of the United States in those suits was that the lessees from the State of Washington were interfering with treaty fishing rights of certain Indian tribes (Tr., pp. 25, 26). The particular lease involved in said suits is in evidence as Defendants' Exhibit 22 (Tr., p. 298). In those suits, Judge Cushman took jurisdiction, obviously on the assumption that the premises were in the State of Washington, and held that the treaty rights of the Indians were not being violated (U. S. v. Baker's Bay Fish Co., et al; U. S. v. McGowan, et al; 2 Fed. Supp. 426). The decision of Judge Cushman was affirmed by this Court on January 16, 1933 (62 Fed. (2d) 955) and by the Supreme Court of the United States (290 U. S. 592, 78 L. Ed. 522, Tr., pp. 25-26). At that time, as now claimed by appellee in this suit, the leased property involved in that litigation was partly or wholly in Oregon, was a part of Sand Island and belonged to appellee.

The claim of Oregon to a considerable part of the premises in dispute was definitely made and insisted upon for years before this suit was brought. In 1928, the State of Oregon leased to

Columbia Fishing Company, a body of land, then and at all times thereafter above low water, which is now located in the very heart of the premises in controversy. It is the tract outlined with a heavy red line on the 1934 map, a part of Government's Exhibit 1, and lies south of the westerly end of Sand Island. The property leased at that time by the State of Oregon was surveyed in 1928 by Mr. McLean (Tr., pp. 224, 230, 245). The lease then made by Oregon was for five years from November 27, 1928. The rent reserved was four cents a pound on all food fish taken with drag seines landed on the leased property, with a minimum annual payment of not less than $4250 (Tr., p. 293, Defts.'s Ex. 20). The lessee fished two seasons under this lease. As to what occurred thereafter regarding this lease, a witness for the government testified (Trans., pp. 205-206):

> "The lease made in 1928 by the Oregon State Land Board, which I referred to, was not only for a period of one year, it was for a period of either three or five years. The sands were building up, there was some fishing done on them in 1929, and then the lease was subsequently cancelled because the State of Washington claimed the sands belonged to it and threatened to prosecute Barbey, and of course, if prosecutions were undertaken and sustained the gear would be confiscated, and we advised Mr. Barbey not to take a chance of being arrested and having valuable gear confiscated. I told the State Land Board he didn't want to get into a controversy between the two states,

and the lease was cancelled, I think, in 1930. Barbey was the president of Columbia Fishing Company, to which the lease was made.

* * * *

"I think a correction should be made. I said the 1928 lease of the State Land Board to Columbia Fishing Company had been cancelled by the State Land Board for the reason I gave in my testimony. Since that testimony was given, Mr. Wade, an assistant to the Attorney General of Oregon, has told me that there was no formal cancellation made by the State Land Board. Apparently what happened, the Columbia Fishing Company paid two years' rent, and, for the reasons stated yesterday, that is, threats by the State of Washington, the Columbia Fishing Company just quit operating on the sands. * * *"

For some time before the second amended complaint was filed and the trial begun, the State Land Board of Oregon had under consideration the matter of leasing the premises covered by the lease made by it in 1928, and this was known to appellee. All this was proved by evidence introduced by appellee (Tr., pp. 198 et seq). Indeed, appellee was entirely familiar with the claims of title made by Oregon, what it had done in the past in the assertion of title to and dominion over part of the premises in controversy, and what it was proposing to do at the time of the trial, and had been for some time before (Tr., pp. 198 to 218). It will be observed that, while the case was begun

August 15, 1934, it did not come on for trial until June 11, 1935, although the original complaint alleged a continuing substantial trespass to the irreparable injury of appellee. No restraining order was issued, and none applied for. Probably one reason why the case did not come on earlier was that the two District Judges for Oregon were, or felt that they were, disqualified to sit in the case, and it was necessary to have some judge from another district assigned to try the case. There was some delay and difficulty in getting an outside judge assigned (Tr., p. 198). Judge Cavanah finally came to Portland and opened the trial June 11, 1935.

The second amended complaint was filed the day before and the issues upon which the case was tried were finally made up by the stipulation entered into the day the trial began (Tr., p. 95). At that time, the State of Washington, appearing by its Attorney General, moved for leave to intervene and file its petition in intervention, claiming title to the premises in dispute. At the same time, the State of Oregon made a like motion. The appellee objected to the granting of leave to either state. The Court, in an oral opinion, denied the motion of each state. Leave to intervene was not denied in the asserted exercise of discretion, or because new or collateral issues would be introduced. The appellee in its complaint alleged that

it was the owner of the premises in controversy. The issue presented by the State of Washington was that it was the owner of the premises, and the issue presented by the State of Oregon was that it was the owner. The learned trial court knew exactly what the respective claims were. Everyone else connected with the litigation had known of them for some time before the case was called for trial. The appellants never claimed any title to the premises; disclaimed any claim of title in their answer and alleged whatever rights they had were dependent upon a lease executed by the State of Washington. What is said in the oral opinion of the learned trial court makes it entirely clear that the Court understood that appellee claimed title to the premises in controversy, that Washington made claim of title and that Oregon made claim of title, and that there was a controversy over the ownership of property between the appellee and the two states. The petitions for leave to intervene were denied because the Court was of the view that there was a federal statute which vested in the Supreme Court of the United States exclusive jurisdiction to try controversies between the United States and a state affecting the title to property; that the District Court could not adjudicate upon the claims of a state, and that if the states were permitted to

intervene, jurisdiction of the Court would be ousted (Tr., pp. 92 et seq).

The learned trial court also refused to permit the State of Washington, lessor of appellants, to produce or examine witnesses, present an argument or in any way participate in the trial. It also refused to permit the State of Oregon to participate in any way in the trial (Tr., p. 96).

In Oregon, and also in Washington, on the Columbia River, fishing operations may be carried on from May 1st to August 25th, and from September 10th to March 1st. These periods are the "open seasons". The balance of each year the river is closed to fishing (Tr., p. 103). Appellants carried on no fishing operations after August 25, 1934. The operations carried on by appellants were what are known as drag seine fishing. A drag seine is not a floating gear. By means of a drag seine, fish are landed on the shore. A drag seine is a net or web some 220 to 250 fathoms in length, and about six fathoms wide. Along the top is a float line of cork or other light material. Along the bottom is a lead line and the web of the seine hangs between these two lines. When in water deep enough to accommodate it, a drag seine has something of the appearance of a very long, wide tennis net hanging in the water supported by the float line and held in a vertical position by the lead line. In operation, one end is held to the shore and the

seine is then carried out in a wide semi-circle and drifted with the tide. When the drift is made the free end is pulled ashore, usually with horses, and when the operation has been completed, both ends of the seine are on shore and the fish which have been caught are landed (Tr., pp. 133, 134).

Because of seasonal fish runs and other conditions in the lower Columbia, drag seine fishing is only carried on a couple of months each year. It usually begins some time in June and ends on August 25th, which terminates the open summer season (Tr., p. 269).

Appellants did not fish or attempt to fish in 1935 on the premises in controversy under their lease with Washington, or at all. At the Fall election, held in 1934, the people of Washington passed a law (Initiative Law No. 77, Chap. 1, Laws of Wash. 1935) and Section 6 prohibited the use of drag seines and the issuance of licenses by the State of Washington for such operations within the state on the Columbia River. A witness for the Government testified (Tr., p. 204):

> "In the State of Washington there is a lease out on Peacock Spit which the State of Washington claims takes in all of these sands. Oregon claims it owns part of the sands. In Washington, I don't think since last Fall, a drag seine license might be issued because of an initiative bill passed by the people of Washington in 1934. The question of the constitu-

> tionality of the law was argued in the Supreme Court of Washington some weeks ago, as I understand it. * * *"

The Act was held constitutional by the Supreme Court of Washington (State ex rel Campbell v. Case, 47 Pac. (2d) 24).

Thus it appears that at the time the first amended complaint was filed, and at the time the second amended complaint was filed, appellants were not fishing, or threatening to fish, on any property belonging to appellee, or any of the premises in controversy. It had no lease from the State of Oregon to go upon the premises claimed by that state. It could not procure fishing licenses in the State of Washington to carry on operations on the premises covered by the lease from that state. This embraced all of the premises in question. Since August 25, 1934, when drag seine fishing operations ended for that season, appellants have not used, occupied, gone upon or threatened to use, occupy or go upon any part of the premises in question, or any other property claimed by appellee. This is all made plain by evidence introduced by appellee (Tr., pp. 198 et seq). At the time of the trial there was no controversy except as to who owned the premises in question, that is, whether they were owned by the United States, or by Washington, or by Oregon, or part of each state. This was the unescapable situation because when Oregon

was admitted into the Union it became the owner of all beds and banks to high water mark of the navigable waters in the state and of all tide-land sand bars, sand spits, tide flats, etc., in these waters and has remained the owner thereof, and all accretions thereto, except such as it has granted away. The same is true of the State of Washington. It follows, as a necessary consequence, that the premises in question belong to the one state or the other, unless they are accretions to Sand Island.

In Washington v. Oregon (211 U. S. 127, 53 L. Ed. 118, 214 U. S. 205, 53 L. Ed. 969), the Supreme Court of the United States was called upon to fix the boundary line between the two states. The contention of Washington at that time was that the north ship channel was south of Sand Island and the contention of Oregon was that the north ship channel, as described in the Act of Congress, approved February 14, 1859, admitting Oregon into the Union (Tr., p. 14), passed between Sand Island and Cape Disappointment to the north and northeast in and through Baker's Bay. The Supreme Court sustained the contention of Oregon. However, it did not fix an unvarying boundary line, but rather a varying line. The court fixed the boundary line as the middle of the north ship channel, but recognized that the location of the median line might change from time to time by accretions and with these changes would come a

shifting in the boundary line. The Court said (211 U. S. 135):

> "It is true the middle of the north ship channel may vary through the processes of accretion. It may narrow in width, may become more shallow, and yet the middle of that channel will remain the boundary."

The Court further said (page 136):

> "Concede that today, owing to the gradual changes through accretion, the north channel has become much less important, and seldom, if ever, used by vessels of the largest size; yet, when did the condition of the two channels change so far as to justify transferring the boundary to the south channel? When and upon what condition could it be said that grants of land or of fishery rights made by the one state ceased to be valid because they had passed within the jurisdiction of the other? Has the United States lost title to Sand Island by reason of the change in the main channel? And if by accretion the north should again become the main channel, would the boundary revert to the center of that channel? In other words, does the boundary move from one channel to the other, according to which is, for the time being, the most important, the one most generally used?
>
> "These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the states bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accre-

> tion, and is not moved to the other channel, although the latter, in the course of years, becomes the most important and properly called the main channel of the river.
>
> * * * *
>
> "Our conclusion, therefore, is in favor of the State of Oregon, and that the boundary between the two states is the center of the north channel, changed only as it may be from time to time through the processes of accretion."

Upon rehearing (214 U. S. 205, 215), the Court said:

> "So, whatever changes have come in the north channel, and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion, or, perhaps, also of late years, from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel."

The Supreme Court cited, and applied the rule theretofore announced, in Nebraska v. Iowa (143 U. S. 359, 36 L. Ed. 186) in which it was said (pp. 366, et seq):

> " 'As soon as it is determined that a river constitutes the boundary line between two territories, whether it remains common to the inhabitants of each of its banks, or whether each shares half of it, or, finally, whether it belongs entirely to one of them, their rights, with respect to the river, are in nowise

changed by the alluvion. If, therefore, it happens that, by a natural effect of the current, one of the two territories receives an increase, while the river gradually encroaches on the opposite bank, the river still remains the natural boundary of the two territories, and, notwithstanding the progressive changes in its course, each retains over it the same rights which it possessed before; so that, if, for instance, it be divided in the middle between the owners of the opposite banks, that middle, though it changes its place, will continue to be the line of separation between the two neighbors. The one loses, it is true, while the other gains; but nature alone produces this change; she destroys the land of the one, while she forms new land for the other. The case cannot be otherwise determined, since they have taken the river alone for their limits.

" 'But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course and runs into one of the two neighboring states, the bed which it has abandoned becomes, thenceforward, their boundary and remains the property of the former owner of the river (Sec. 267), and the river itself is, as it were, annihilated in all that part, while it is reproduced in its new bed and there belongs only to the State in which it flows.'

"The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel, and that avulsion would establish a fixed boundary, to-wit, the center of the abandoned channel."

We refer to these cases and quote from the opinions for the purpose of showing the basis for the respective claims of the States of Oregon and Washington.

Washington, as we understand it, claims that the north ship channel, within the meaning of the decision of the Supreme Court of the United States in Oregon v. Washington, supra, is that channel between Peacock Spit and Sand Island, and close to the latter leading from the Columbia River into Baker's Bay, as shown on the maps for the years 1923 to 1931 (Govt.'s Ex. 1). These maps show that the only charted channel from the Columbia River to Baker's Bay area between Sand Island and Peacock Spit, was the channel close to Sand Island. On the 1932 map, there is no channel charted either between the premises in controversy or at the break across Peacock Spit, which occurred a couple of years before. On the 1933 map, there is a channel charted at the break through Peacock Spit, and so on the map of 1934. In February, 1928, the "North Bend" went ashore on the westerly or ocean side of Peacock Spit. The point where it went ashore is shown on the map of 1928. During heavy storms in the latter part of January, and the early part of February, 1929, the "North Bend" worked its way across the Spit, a distance of several thousand feet, and dropped into the channel between Peacock Spit and Sand

Island, which, by the way, was then the only channel leading to the north into Baker's Bay. The vessel had a length of about 225 feet over all and a hold depth of about 14 feet. When it dropped into the channel it was full of water and drew about 20 feet. It was pumped out and taken to Astoria through this channel. Evidently, the later action of the water widened and deepened the gash cut across Peacock Spit by the "North Bend" (Test. of Mr. Cherry, Tr., pp. 218, 219). Speaking of this, he said:

> "I would not exactly say there was a channel left where the vessel worked its way across Peacock Spit. There was a place where she went through, but you would hardly call it a channel; it was a sort of a gash in the sand (Tr., p. 220)."

On the 1930 map, at about the place where the "North Bend" cut across Peacock Spit, there is shown a strip of clear water, but it is not charted. Again on the 1931 map, and also on the 1932 map, there is shown a strip of clear water; that is, an area below low water, as yet uncharted. On the 1933 map, there is a charted channel shown across Peacock Spit, with a minimum depth of five feet. The same channel is shown on the 1934 map, with a minimum of six feet.

It is the claim of the State of Washington that the north ship channel is the channel close to Sand

Island, that the median line of that channel marks the boundary between the two states, and that this boundary remains at the point at which Sand Island and the body of sand to the south and west came together, as shown on the maps for 1931, 1932, 1933 and 1934. The position of the State of Washington, as we understand it, is that the channel which cut across Peacock Spit, separating it into two parts, was the result of the heavy storms of 1929, and the gash cut by the "North Bend"; that it did not become the north ship channel because it was not the result of the processes of accretion, but, rather, that of violent and sudden change in the nature of avulsion, which did not shift the boundary line. The contention of the State of Oregon, as we understand it, is that when a channel was cut across Peacock Spit, as a result of the gash cut by the "North Bend", or through other causes, that channel became the north ship channel and the median line thereof the boundary between the two states.

What is here in dispute is that large body of land, all above low water and some above high water at the time, lying south and east of the cross cut gash or channel and separated by it from the balance of Peacock Spit.

It will be observed that the entire area above and below this cross cut channel is designated as

"Peacock Spit" on the map of 1929 and later maps. A large cross is in the center of the premises in dispute and the charted channel is still between these premises and Sand Island in 1931. Reference to a cross which is a coordinate marking the undersection of Latitude 46° 16′ and longtitude 124° 02′ appearing on various maps will aid in fixing locations. The 1932 map also shows the premises in dispute, the large body of land south and southwest of Sand Island, with a strip of clear but uncharted water separating it from the balance of Peacock Spit. On the 1932 map for the first time the channel between Sand Island and the premises in controversy is not charted, but is clearly shown. The 1933 map shows that this body of land made contact with Sand Island at one point, but there is still a channel between it and Sand Island the greater part of the distance. On the 1934 map, clear water is still shown between the premises in controversy and Sand Island except for a short distance to the west and north.

It is the contention of appellants that the premises in controversy are not accretions to Sand Island, and do not belong to appellee, and that the findings and decree that they are accretions to Sand Island and belong to the United States are wholly unsupported by the evidence. Later in this brief, we will discuss at some length the evidence upon this phase of the case. Although the States

of Oregon and Washington were denied the right to intervene, to become parties to the suit, or to participate therein in any way, practically all of the evidence introduced by appellee and by the appellants dealt with the question, and the only question in the case, whether the premises in controversy were owned by Washington, or by Oregon, or in part by each, or were owned by the appellee as accretions to Sand Island. There was no controversy then as to whether appellants were trespassing, or threatening to trespass, on any property claimed by appellee, including the premises in dispute. They were not at any time in 1935 trespassing upon or threatening to trespass upon any of these premises. They had no lease from the State of Oregon to go upon any property claimed by it. Because of the Initiative Law passed in Washington, they could not procure drag seine licenses in Washington. They were not carrying on any fishing operations, could not do so, and were not threatening to do so, on any of the premises in question in 1935, and could not do so in any subsequent year unless they could procure a lease at public auction from the State of Oregon, and the Initiative Law referred should be repealed in the State of Washington. There is no dispute as to this.

The trial court, among other things, found that the appellee was the owner of Sand Island and all

the premises in dispute as accretions thereto; that the premises were very valuable for fishing purposes; that appellants have threatened in the past and at the time the findings were made and decrees entered were threatening to enter upon these premises and to carry on fishing operations thereon to the irreparable injury of appellee (Tr., pp. 48, 49, 52, 56, 61).

The Court also made findings as to the location of the boundary line between the two states. The finding is that the middle of the new channel which cuts across Peacock Spit is the boundary line between the states (Tr., pp. 34, 48). The Court decreed that appellee was the owner and entitled to the immediate and exclusive possession of Sand Island and (Tr., pp. 60, 61):

> "The said Sand Island is bordered on the north and east by a body of water styled as Baker Bay, on the south by the main body of the Columbia River, and on the west by a channel of water leading from Baker Bay into the main Columbia River, which said channel is commonly known and referred to as the North ship channel of the Columbia River;
>
> "That said description embraces all sands and tide flats between high and low water abutting upon and projecting from Sand Island, with particular reference to the sands and tide flats situate along the southerly and westerly shore of said Island, which it is hereby decreed have become a part and parcel of Sand Island by process of accretion. For a more

> particular description of Sand Island, reference is made to the map and chart hereto attached marked exhibit 'A', and made a part hereof. The area designated on Sand Island as 'Sands' and colored in yellow, is the area which is hereby decreed to have formed as an accretion to Sand Island."

and enjoined the appellants from going upon the said premises decreed to be accretions to Sand Island for any purpose except under permit or lease from the appellee, and that appellee should recover from appellants its costs and disbursements (see map, Tr., p. 58).

In the complaint it is alleged that about the 1st of May, 1930, two of appellants entered into a lease (Govt.'s Ex. 3, Tr., p. 100) with appellee covering sites 1, 2, 3, 4 and 5 on Sand Island for seining purposes, and that the premises upon which the appellants carried on their fishing operations, after this lease with appellee was cancelled, was on the sites described in this lease. The lease referred to was executed March 27, 1930, by the Secretary of War for a period of five years, beginning May 1, 1930, annual rental $37,175. It was executed pursuant to the Act of July 28, 1892, and was

> "subject to revocation at the will of the Secretary of War and the uses and occupation of the premises were subject to such rules and regulations as the Commanding Officer at Fort

Stevens, Oregon, should from time to time prescribe."

Under this lease, fishing operations were carried on until August 25, 1931, and at no time thereafter (Tr., p. 103). The lease was cancelled by the Secretary of War on May 10, 1932 (Tr., p. 214). There were various reasons for the cancellation. Appellants had requested it because of a change in economic conditions and the shoaling up of some of the sites. The cancellation apparently fitted in with the plans of the War Department, because the program of the Engineers called for the construction of a number of dikes projecting into the river from the south shore of Sand Island, and these dikes were to be located on the fishing sites covered by the lease which would make seining operations impracticable.

The construction of some of the dikes was begun in 1932 and continued through 1933 and 1934 (Tr., pp. 114, 119). The locations of these dikes are shown on the maps for 1932, 1933 and 1934. It will be noted that the 1932 map shows one dike completed. The 1933 map shows two others in process of construction, the most westerly being immediately east of the tip of the land in controversy. The 1934 map shows three dikes completed (Govt.'s Ex. 1).

Now it is quite impossible that the fishing operations carried on by the appellants under lease

with the State of Washington in 1932, 1933 and 1934, should be on the premises described in the lease from the Secretary of War. Page 102 of the transcript is a plat or map attached to the lease from the United States, canceled May 10, 1932. It covers the south shore of Sand Island from the easterly tip thereof west a distance of about 18,000 feet, or about 3½ miles. The lease is only to low water mark, beyond which appellee had no rights. The projecting lines, shown on this map, running south and at right angles to the shore line, do not indicate the then low water limits, but merely define the projected side lines of the sites. The lease is only for drag seine fishing operations. The most easterly tip of the premises in controversy are south of Site 1 and part of Site 2, and west of the other sites. The evidence is that practically all of the fishing operations under the lease from the United States were on Sites 3 and 4. Site 5 was snagged, as were Sites 1 and 2, and these sites were of very little or no value for fishing. In fishing operations on Sand Island, the fish were landed along the shore line marked by the heavy line. It is a black line on the map at page 102 of the Transcript and, of course, is a heavy white line on the blueprint maps making up Government's Exhibit 1.

It will be recalled that the operations under the leases to appellants from the State of Washington began as early as 1928, and that in 1928 and 1929,

fishing operations were carried on on a part of the premises now in dispute under lease from the State of Oregon. In the meantime, operations were being carried on at the sites on Sand Island under lease from the Secretary of War up to August 25, 1931.

The operations carried on by appellants in 1932, 1933 and 1934, and prior years, under leases from the State of Washington, were always on lands designated on the government maps as Peacock Spit. In these operations the drag seines were always put out on the ocean side of the land, distant from the shore line of Sand Island. The fish, when gathered up on the shore after a drift, were loaded into wagons and hauled across these sands to the docks at the inshore side. Throughout all these fishing operations, up to and including 1934, on the premises in controversy, docks, buildings, etc., were maintained on these sands and always on the inshore side, and these docks extended into waters constituting the channel between the premises upon which the fishing operations were being carried on and Sand Island. Indeed, with respect to the fishing operations in 1934, although the premises upon which the fishing operations were being carried on had united with Sand Island, at one point, the dock which served the fishing operations was built out from these premises northward into the channel between them and Sand

Island. The boats reached this dock and carried in supplies and carried away fish through a channel which came in around the premises in controversy immediately west of the most westerly dike and thence close to the shore line of Sand Island. The undisputed evidence is that, from 1920 on, the westerly and southerly shore line of Sand Island opposite the premises in controversy, was slowly but constantly eroding and receding. The two bodies of land come into contact through the building up of and accretions to the land in dispute.

We will discuss the evidence more at length in connection with our contention that the Findings and Decree that appellee is the owner of the premises in controversy, is wholly unsupported by the evidence.

SPECIFICATION OF ERRORS RELIED ON

The District Court erred in the following particulars:

(a) In denying the petition of the State of Washington for leave to intervene (Tr., pp. 92, et seq., 62); Assignment of Error XXIII (Tr., p. 72).

(b) In denying the petition of the State of Oregon to intervene (Tr., pp. 92, et seq, 62); Assignment of Error XXIV (Tr., p. 72).

(c) In finding and decreeing that neither the State of Oregon nor the State of Washington was an indispensable party (Tr., p. 62); Assignment of Error XXVI (Tr., p. 72).

(d) In denying the motion of appellants and refusing to dismiss the bill of complaint as amended for want of jurisdiction, and because of the absence of indispensable parties (Tr., p. 62); Assignments of Error XXII, XXVI, XXVII (Tr., p. 72).

(e) In finding and decreeing that appellee was the owner of the premises in controversy, and that the same were accretions to Sand Island; Assignments of Error I to VI, XVII, XVIII, XIX, XXV (Tr., pp. 66, 67, 68, 70, 71, 72).

(f) In finding and fixing by decree the boundary line between the States of Oregon and Washington; Assignments of Error I, III, V, XVII, XVIII, XIX (Tr., pp. 67, 68, 70, 71).

(g) In finding and holding that the premises in controversy were an accretion to Sand Island and that the appellee was the owner and in exclusive possession thereof for many years,

or at all; Assignments of Error I to VI, XVII, XVIII, XIX, XXVI (Tr., pp. 66, 67, 70, 71).

(h) In finding and decreeing that the southerly and southwesterly shore line of Sand Island abuts and faces upon the main body of the Columbia River, and that the south and southwest shore line of Sand Island is adapted to and valuable for the drawing of seines and fishing gear; Assignments of Error Nos. VII, VIII (Tr., p. 68).

(i) In finding and decreeing that sites Nos. 1, 2, 3, 4 and 5 described in the lease dated March 27, 1930, between the United States as lessor and appellants H. J. Barbey and Columbia River Packers Association, lessee, embraces any part of the premises in dispute, and that the appellant used or occupied said sites, or any part thereof, after August 25, 1931; Assignments of Error Nos. IX, X, XI (Tr., pp. 68, 69).

(j) In finding and decreeing that the appellants, or either thereof, threatened or intended to enter upon, or entered upon, Sand Island or any part thereof; Assignments of Error Nos. XI, XII (Tr., pp. 69, 70).

(k) In finding and decreeing that unless restrained appellants will occupy and use said fishing sites for fishing operations during the season of

1935, or succeeding years; Assignment of Error No. XIII (Tr., p. 70).

(l) In finding and decreeing that the appellants, or either thereof, entered upon, or intended to enter upon any part of Sand Island, or any part of the premises in dispute, to conduct fishing operations thereon in 1935, or succeeding years; Assignments of Error Nos. X, XI, XII, XIII, XIV, XXI (Tr., pp. 69, 70, 71).

(m) In finding and decreeing that appellants never had or enjoyed any right or interest in the premises in dispute except under lease executed by the United States; Assignments of Error Nos. XIV, XX (Tr., pp. 70, 71).

(n) In finding and decreeing that appellants, their officers, etc., should be and are enjoined and restrained from occupying or attempting to occupy the premises in dispute; Assignments of Error Nos. XX, XXI (Tr., p. 71).

(o) In refusing to enter a decree dismissing this suit; Assignment of Error No. XXVII (Tr., p. 73).

(p) In decreeing that appellee should recover from appellants its costs and disbursements; Assignment of Error No. XXVIII (Tr., p. 73).

The subject matter of this litigation is the title to a large body of land lying westerly and southwesterly of Sand Island. The State of Washington claims title to the whole thereof. The State of Oregon claims title to all, or a large part thereof. The United States claims title thereto as an accretion to Sand Island. The appellants at no time have claimed title to any part. The two States are indispensable parties.

California v. Southern Pacific Co., 157 U. S. 229, 249, 39 L. Ed. 683, 690.

Gregory v. Stetson, 133 U. S. 579, 33 L. Ed. 792.

New Mexico v. Lane, et al., 243 U. S. 52, 58, 61 L. Ed. 588, 591.

C. M. & St. P. Co. v. Adams County, et al., 72 Fed. (2d) 816, 818.

Skeen v. Lynch, 48 Fed. (2d) 1044, 1046.

U. S. v. Ladley, 51 Fed. (2d) 756, 757.

ARGUMENT

The subject matter of this litigation is the title to a large body of land having an area of between 150 and 200 acres, lying westerly and southwesterly of Sand Island. The appellee claims title to these

lands as an accretion to Sand Island. The State of Washington claims title to the whole area. The State of Oregon claims title to all or a substantial part of the tract. The appellants at no time claimed title to these lands, or any part thereof. All this was well known to appellee when the suit was brought. The situation was made clear by the allegations in the answer of appellants, was understood by the learned trial court, as is shown by the oral opinion denying the motions of Oregon and Washington to intervene (Tr., p. 92). We have seen, by what has been said in the Statement of Facts, supra, that the claim of the State of Washington is of long standing. For many years, with the knowledge of appellee, it leased the premises in controversy, deriving a large revenue therefrom. Since May 7, 1928, it has leased these premises to one or the other of the appellants (Tr., pp. 297, 298, 299). It will be recalled that in Paragraph IX of the original complaint, filed by appellee in this suit on August 15, 1934, in evidence as Government's Exhibit 25, it was alleged that appellants (Tr., p. 306):

> "Fraudulently entered into a pretended lease with the State of Washington, through its said Commissioner of Public Lands, for certain lands which were described as Peacock Spit, but which were in fact lands which lie between low water mark and high water mark on a spit wholly within the boundaries of the State of Oregon, and a part of Sand Island."

These allegations refer to the premises in controversy. Each of the successive leases by the State of Washington covered the same premises. These premises were involved in the suits brought by the United States, as trustee for certain Indians, against McGowan, and against two of the appellants, in the District Court for the Western District of Washington, Southern Division, decided January 29, 1931, by Judge Cushman (United States as Trustee, etc., v. McGowan; United States as Trustee, etc., v. Baker's Bay Fish Co., et al., 2 Fed. Supp. 426) and affirmed January 16, 1933, by this Court (62 Fed. (2d) 955). And in these suits the government alleged that the premises were in the State of Washington, were leased by the State of Washington, and that the lessees were interfering with the treaty fishing rights of certain Indian tribes.

The claims of the State of Oregon also, as we have seen, were of long standing. A part of the premises in controversy was surveyed and leased by the State of Oregon in 1928, to Columbia Fishing Company for a term of five years (Tr., p. 293). Under this lease, fishing operations were carried on for a time, and then ceased because the State of Washington claimed that the land covered by the lease belonged to it, and threatened to prosecute the Oregon lessee and confiscate its gear if fishing operations did not cease (Tr., pp. 205, 206).

At the time the trial of this suit began, and for some time prior thereto, the State Land Board of the State of Oregon had under consideration the matter of leasing the same premises that it had leased in 1928 (Tr., pp. 198 et seq.). This was known to appellee some time before the second amended complaint was filed on June 10, 1935, and was established by testimony introduced by appellee (Tr., pp. 198 et seq.).

The title to Sand Island was not in dispute (Tr., p. 13). Everybody connected with this litigation, the appellee, the appellants, the learned trial court, all understood, what was made clear by the pleadings and the record, that appellee claimed title to the premises in controversy as an accretion to Sand Island, that the State of Washington claimed title to the premises in controversy, that the State of Oregon claimed title to all or part of the premises, that the appellants made no claim of title to any part, and that the only controversy respecting the title was between appellee and the States of Oregon and Washington. The trial court regarded the location of the boundary line between the two states, a material issue (Tr., p. 34), and made a distinct and very definite finding as to the location of Sand Island (Tr., p. 48). In other words, the Court proceeded to establish the line separating the two states in a suit in which they were denied all opportunity to be heard.

The decree adjudged and decreed that appellee (Tr., pp. 60, 61):

> "is the owner and entitled to the immediate and exclusive possession of the tract of land and island known as Sand Island, which said island is described as follows:
>
> "That certain island commonly known and referred to as Sand Island * * *
>
> "That said Sand Island is bordered on the north and east by a body of water styled as Baker Bay, on the south by the main body of the Columbia River, and on the west by a channel of water leading from Baker Bay into the main Columbia River, which said channel is commonly known and referred to as the North ship channel of the Columbia River;
>
> "that said description embraces all sands and tide flats between high and low water abutting upon and projecting from Sand Island, with particular reference to the sands and tide flats situate along the southerly and westerly shore of said Island, which is hereby decreed have become a part and parcel of Sand Island by process of accretion. For a more particular description of Sand Island, reference is made to the map and chart hereto attached, marked exhibit 'A' and made a part hereof. The area designated on Sand Island as 'Sands' and colored in yellow is the area which is hereby decreed to have formed as an accretion to Sand Island."

In other words, the learned trial court decreed that the premises claimed by the States of Oregon and Washington was the property of appellee as an accretion to Sand Island.

Upon this record we submit that the States of Oregon and Washington were indispensable parties.

In California v. Southern Pacific Co., 157 U. S. 229, 249, 39 L. Ed. 683, 690, the Supreme Court of the United States had before it a suit in which it announced a rule directly applicable here. The suit was brought in the Supreme Court by the State of California against the Southern Pacific Company. It was alleged, in substance, in the bill, that California on its admission into the Union became the owner of the soil of the beds of the Bay of San Francisco and all the arms thereof; that certain grants, alleged to be unlawful, were made to the City of Oakland, which in turn had made grants to the Southern Pacific Company and others. The City of Oakland was, of course, interested in the title to the grants which it had made. The Court held that any decree passed in the case would materially affect the rights of Oakland and others, because if the relief prayed for by the State of California were granted, the effect would be to impair all grants made by the City of Oakland to others than the Southern Pacific Company, and cloud their titles; that in the absence of the City of Oakland and others, the Court would not pronounce a decree; that if the City of Oakland and others, citizens of California, were made parties, the jurisdiction of the Court would be ousted, hence the bill was dismissed. The Court, in part, said:

"It was held in Mallow v. Hinde, 25 U. S. 12 Wheat. 193 (6:599), that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the circuit court if its process cannot reach them, or if they are citizens of another state; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the circuit court forms no ground for dispensing with such parties. And the court remarked: 'We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court.'

"In Shields v. Barrow, 58 U. S. 17 How. 130 (15:158), the subject is fully considered by Mr. Justice Curtis, speaking for the Court. The case of Russell v. Clarke, 11 U. S. 7 Cranch, 98 (3:281), is there referred to as pointing out three classes of parties to a bill in equity. * * * '3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'

* * * *

"Mr. Daniell thus lays down the general rule: 'It is the constant aim of a court of equity to do complete justice by deciding upon and setttling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject, ought generally, either as plaintiffs or defendants, be made parties to the suit, or ought by service upon them of a copy of the bill, or notice of the decree to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.'

* * * *

"Sitting as a court of equity we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons, who have an immediate interest in resisting the demands of complainant, are not indispensable parties or, at least, so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the state and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience

* * * *

(P. 255):

"But it was said that, notwithstanding the breadth of the prayer, relief, if accorded, would be confined to the seven specified parcels, and that the decree would not bind those claiming

interests in other parts of the water front, although as to the particular parcels, defendant's lessors, the Central Pacific Railroad Company and the South Pacific Coast Railway Company and its grantor, the Oakland Water Front Company, all corporations, and citizens of California, would be bound. Considered, however, in reference to the main contention of the state, namely, the want of power to make the grant of the entire water front at all, the argument treated the water front as one and indivisible for the purposes of the case. Indeed, it was insisted that even if it were conceded that the legislature could empower a municipality to deal with parts of its water front in the interest of the public by authorizing the construction of improvements to a certain extent, creating so far a proprietary interest in those thus authorized, yet that such action as to portions of the grant, though sustainable if independent thereof, must be regarded as involved in the invalidity of the entire grant. Irrespective, then, of the extent, technically speaking, of the effect and operation of a decree as to the seven parcels, based on that ground, as res adjudicata, it is impossible to ignore the inquiry whether the interests of persons not before the court would be so affected and the controversy so left open as to future litigation as would be inconsistent with equity and good conscience.

* * * *

"If this court were of opinion that the City of Oakland occupied the position of the successor merely of the town of Oakland; that the grant of the water front to the town was as comprehensive as is claimed by defendant, and that it had not been annulled by any act of the legislature, but also held that the state

had no power to make such grant, then the City of Oakland would be deprived of the rights it claims under the grant, not by the exercise of the legislative power of the state as between it and its municipality, but by a judicial decree in a suit to which the city was not a party.

"And if the proceedings which purported to vest title in the Oakland Water Front Company were held ineffectual, for the same reason, then the latter company would find the foundation of its title swept away in a suit to which it also was not a party.

"This is not an action of ejectment or of trespass quare clausum but a bill in equity, and the familiar rule in equity, as we have seen, is the doing of complete justice by deciding upon and settling the rights of all persons materially interested in the subject of the suit, to which end such persons should be made parties."

New Mexico v. Lane, et al., 243 U. S. 52, 58, 61 L. Ed. 588, 591, was an original bill filed by the State of New Mexico in the Supreme Court of the United States, against the Secretary of the Interior and the Commissioner of the General Land Office, to establish the asserted title of the state to certain lands under a school land grant and to restrain the Interior Department from disposing of such lands. It appeared that a Mr. Keepers had filed on a part of the land in controversy, and had acquired certain rights therein under the laws of the United States, if the land did not belong to

the state as a part of its school land grant. He was a citizen of New Mexico. Motion to dismiss the bill was filed on the grounds, among others, that the United States was an indispensable party and had not consented to be sued, and that Keepers had acquired an interest in the land and was also an indispensable party. The Court held that the United States was an indispensable party, and also held that Keepers was an indispensable party, that he was a citizen of New Mexico, and that to make him a party would oust the Court of jurisdiction, hence the bill was dismissed.

In Skeen v. Lynch, 48 Fed. (2d) 1044 (certiorari denied 284 U. S. 633), it appeared that Skeen had entered 640 acres of land in a county in New Mexico for agricultural purposes as his homestead. The law under which the land was entered reserved coal and other minerals, together with the right to prospect for, mine and remove the same. Thereafter the Interior Department issued a license or permit to Lynch and others to prospect and drill for oil and gas on the land, and the permittees entered upon the premises and began operations under their permit. Suit was brought by Skeen against the permittees to restrain them from going upon the land to prospect for oil and gas, and to quiet title as against them to oil and gas, upon the ground that the reservation contained in the patent to Skeen only reserved coal and other minerals of

a solid and similar nature to coal. The situation of Lynch and his associates, permittees of the government, was quite like the situation of appellants in this case, lessees from the State of Washington. It was contended by defendants that the United States was an indispensable party for the reason that its title to the oil and gas, if any, under the surface, would be clouded by decree for Skeen. The court sustained this contention and dismissed the bill, in part saying:

> "The bill shows that defendants named claim no interest in the oil and gas other than as permittees and prospective lessees of the United States. The interest of the United States in the subject matter in litigation is not less obvious and substantial than it was in the case of Louisiana v. Garfield, 211 U. S. 70, 29 S. Ct. 31, 53 L. Ed. 92, in which it was held to be an indispensable party. * * * A decree for plaintiff on the first count would be a cloud on the title of the United States, and its permittee and prospective lessee would be subject to ouster if she continued to attorn to the United States. In New Mexico v. Lane, 243 U. S. 52, 37 S. Ct. 348, 61 L. Ed. 588, the state claimed title to forty acres under Congressional grant and prayed that it be adjudged the owner. A certificate of purchase of the forty acres as coal land had been issued to one Keepers by the United States. Held: Keepers was an indispensable party. In California v. Southern Pacific Co., 157 U. S. 229, 15 S. Ct. 591, 599, 39 L. Ed. 683, it was held that 'if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made be-

tween them without affecting the rights of the absent parties', the court cannot proceed with the adjudication in their absence; that 'the familiar rule in equity, * * * is the doing of complete justice by deciding upon and settling the rights of all persons materially interested in the subject of the suit, to which end, such persons should be made parties'. See, also, American T. & S. Bank v. Scobee, 29 N. M. 436, 224 P. 788. Story's Equity Pleadings (10th Ed.) § 138: 'In the next place, an interest of the absent parties in the subject-matter, ex directo, which may be injuriously affected, is not indispensable to the operation of the rule; for, if the defendants actually before the court may be subjected to undue inconvenience, or to danger of loss, or to future litigation, or to a liability under the decree, more extensive and direct, than if the absent parties were before the court, that of itself, will, in many cases, as we shall presently see, furnish a sufficient ground to enforce the rule of making the absent persons parties.' "

In Chicago, M. & St. P. Co. v. Adams County, et al., 72 Fed. (2d) 816, 818, this Court, in part, said:

"An early and able discussion of the entire question of indispensable parties is to be found in the following oft-quoted passage from the opinion of Mr. Justice Curtis, in Shields v. Barrow, 17 How. (58 U. S.) 130, 139, 15 L. Ed. 158. After quoting from Russell v. Clarke's Executors, 7 Cranch 98, 3 L. Ed. 271, the learned jurist continued: 'The court here points out three classes of parties to a bill of equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who

ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'

"The definition of the term 'indispensable party' and the reason for the application of the rule as to such party in the federal courts, was well stated in the leading case of Sioux City Terminal R. & W. Co. v. Trust Co. of N. A. (C. C. A. 8), 82 F. 124, 126, affirmed in 173 U. S. 99, 19 S. Ct. 341, 43 L. Ed. 628: 'The general rule in chancery is that all those whose presence is necessary to a determination of the entire controversy must be, and all those who have no interest in the litigation between the immediate parties, but who have an interest in the subject matter of the litigation, which may be conveniently settled therein, may be, made parties to it. The former are termed necessary, and the latter the proper, parties to the suit. The limitation of the jurisdiction of the federal courts by the citizenship of the parties, and the inability of those courts to bring in parties beyond their jurisdiction by publica-

tion, has resulted in a modification of this rule, and a practical division of the possible parties to suits in equity in those courts into indispensable parties and proper parties. An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree between the parties before the Court cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or the subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court, or the suit will be dismissed.'

* * * *

" 'The general rule in equity is that all persons, materially interested, **either legally or beneficially**, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all. By this means the court is enabled to make a complete decree between the parties to prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be granted upon a partial view only of the real merits. When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto. Story, Eq. Pl. § 72.

> " 'The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the court, sua sponte, though not raised by the pleadings or suggested by the counsel.' "

United States v. Ladley, 51 Fed. (2d) 756, is a decision by Judge Cavanah, before whom this suit was tried. It contains a very lucid discussion as to who are indispensable parties. On the facts it is very much like the case at bar, and the holding of Judge Cavanah then was, as we read the decision, directly contrary to the holding in this case. Suit was brought by the United States against Ladley to quiet title to property formerly the bed of Mission Lake, in Idaho. The claim of the United States was that at the time Idaho was admitted to the Union, the lake was non-navigable, and therefore belonged to the riparian lands of an Indian tribe. Ladley claimed that the lake was navigable when Idaho was admitted into the Union and that, having complied with the laws of the state, he had acquired title to part of the bed thereof. The State of Idaho moved for leave to intervene, claiming that it was the owner of the bed of the lake. The United States opposed intervention by the state upon the grounds that it was not an indispensable party, and that if interven-

tion were allowed the Court would be ousted of jurisdiction. The Court held that the state was an indispensable party, that it should be allowed to intervene, as a matter of absolute right, and that such intervention would not oust the Court of jurisdiction. The Court said, in part (p. 757):

> "Of course the rights of all persons interested in the subject-matter of the suit should be decided in the present litigation, and parties having an immediate interest in the subject ought to be made parties to the suit. The state is so situated in respect to this litigation that the court ought not to proceed in its absence, and, when brought in, the case would be between the United States on the one hand and the state on the other, with the defendant, one of the citizens of the state, contesting both the rights of the United States and the state. The interest of the state is of such a nature that a final decree could not be made in the action without affecting that interest, and it would be improper for a court of equity in the exercise of a fair discretion to proceed without it. State of California v. Southern Pacific Co., 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683; New Mexico v. Lane, et al., 243 U. S. 52, 37 S. Ct. 348, 61 L. Ed. 588; Louisiana v. Garfield, 211 U. S. 70, 29 S. Ct. 31, 53 L. Ed. 92; Percy Summer Club v. Astle, et al. (C. C.), 110 F. 486."

The Court further held, with ample citation of authority to support it, that when a state intervened it waived its immunity from suit and the Court had jurisdiction to proceed and determine

the controversy between it and the United States. (See also Gregory v. Stetson, supra.)

The decree should be reversed and the suit dismissed or the States of Oregon and Washington permitted to intervene and litigate their claims of title. The United States may sue either or both States in the Supreme Court of the United States and litigate title. Neither State can sue the United States without its consent, which has not been given; hence, if the decree stands, the asserted titles of the States will be perpetually clouded, because there is no Court to which they may go to have them litigated.

United States v. Texas, 143 U. S. 621, 36 L. Ed. 285.

United States v. Oregon, 295 U. S. 1, 79 L. Ed. 1267.

Kansas v. United States, 204 U. S. 331, 341, 51 L. Ed. 510, 513.

Minnesota v. Hitchcock, 185 U. S. 373, 386, 46 L. Ed. 954, 962.

Oregon v. Hitchcock, 202 U. S. 60, 68, 50 L. Ed. 935, 938.

State, ex rel North Dakota, 257 U. S. 485, 489, 66 L. Ed. 329, 331.

United States v. Turner, 47 Fed. (2d) 86.

ARGUMENT

The facts in this case make peculiarly persuasive and forceful the contention that the States of Oregon and Washington are indispensable parties, without whose presence no decree should have been passed.

Appellee adopted the procedure of bringing suit to litigate its title to the lands in controversy against appellants, who claimed no title, as appellee well knew when the suit was brought. The suit was brought in the District Court, a forum selected by appellee. It could have brought suit in the Supreme Court of the United States and made both states defendants. It successfully objected to the states being made parties, although they sought to intervene and submit themselves to the jurisdiction of the Court. The states were the only claimants to title adverse to appellee. The objection urged against the states being allowed to intervene was mainly based on the ground that if intervention were allowed the District Court would be ousted of jurisdiction. Thus by the device of bringing suit against parties who had, and claimed, no title to the premises in controversy, in a Court which appellee, in opposing the petitions for inter-

vention, successfully contended had no jurisdiction to adjudicate conflicting claims to the property between the United States and the states, appellee has secured a decree which for all practical purposes in a decree that neither state has any title. This decree, if permitted to stand, will be a perpetual cloud upon the title asserted by the states, for the reason that the states can have no judicial redress; there is no court to which they may go and sue the government and have their asserted titles litigated.

The learned trial court clearly understood that the real controversy was between appellee and the states. This is manifest from the language used in the oral opinion denying the petitions for intervention. He fell into the error of assuming that the Supreme Court of the United States had exclusive jurisdiction, that intervention by the states would oust the court of jurisdiction, and that the states might go into the Supreme Court, or some other court, which he did not identify, and litigate their claims to the property against appellee. The attention of this court is invited to some language used by the learned trial court in the oral opinions referred to (Tr., pp. 92, et seq.). In part, he said:

> "COURT: I appreciate, gentlemen, you have a question of jurisdiction between the United States and the states. We have a statute, as I recall it, which provides that an action be-

tween the government and the states involving title to property, the Supreme Court of the United States has original jurisdiction. * * * Under that statute, Congress has granted original jurisdiction in the Supreme Court of the United States in controversies over ownership of property between the government and the state. Now, with that statute in mind, if the court permits these petitions for intervention of the States of Oregon and Washington, I will be assuming original jurisdiction here, when it belongs in the Supreme Court of the United States, and I doubt whether any theory of this court would avail you anything at all. * * * That is the purpose of that statute granting original jurisdiction to the Supreme Court in controversies between the state and the government over the ownership of property. You can see what the result might be. Now the states are not necessary parties in this litigation, as I view it. This court can go on and determine the controversy between the government and these defendants. It is true it would not bind the State of Oregon or the State of Washington. It would only be binding on the parties before the court, and that would be the United States and these defendants. If the States of Washington and Oregon afterwards desired to litigate it would probably bring whatever suit it thought proper. And I am under the impression, gentlemen, that this question of jurisdiction is a very serious one, where you have to determine between the two states and the United States government the ownership of this property.

"* * * I am under the impression, gentlemen, that these petitions of intervention should not be allowed, but the case should proceed between the original parties, and you will

> have to determine hereafter the interests of these states in the proper forum."

The views thus expressed by the learned trial court are in direct conflict with the well considered opinion rendered by him in United States v. Ladley, 51 Fed. (2d) 756, referred to, supra.

The Court did not identify the statute to which he referred and upon which his holding seems to have been based, or the court to which the states might go to litigate their asserted titles. He may have referred to Section 233 of the Judicial Code (Section 341, Title 28, Chapter 9, U. S. C. A.), which, in part, reads:

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of another state, or aliens, in which latter case it shall have original, but not exclusive, jurisdiction."

This statute has existed without change since 1787, and has never been construed as authorizing a state to sue the United States, or as precluding a subordinate Federal Court from taking jurisdiction of a controversy affecting the rights of a state when the state has voluntarily submitted to its jurisdiction. The learned trial court in the case at bar evidently overlooked his decision in the Ladley case, supra, stated in the following lan-

guage, holding that the State of Idaho had a right to and should be permitted to intervene (p. 757):

> "By Section 41 of the statute, the original jurisdiction of the District Court among others, is: 'Of all suits of a civil nature, at common law or in equity, brought by the United States.' This section gives to District Courts concurrent jurisdiction over suits brought by the United States with the jurisdiction of the Supreme Court of the United States which is original. The United States under this section could maintain an action in the District Court against the state, as there are no exceptions. Referring then to Section 341 of the statute, so far as applicable here, we find that there is defined both the original and exclusive jurisdiction of the Supreme Court as it is there declared that 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases, it shall have original, but not exclusive, jurisdiction.' While it is true that this clause declares 'the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party', yet the Supreme Court has held that it has no application to suits against the United States and bases its decision upon the conclusion that Congress had authorized the United States to be sued in the Court of Claims, and for the reason 'there could, then, be no controversies of a civil nature against the United States cognizable by any court where a State was a party. The Act of March 2, 1875, in extending the jurisdiction of the Circuit Court to all

> cases arising under the Constitution or laws of the United States, does not exclude any parties from being plaintiffs. Whether the State could thereafter prosecute the United States, upon any demand in the Circuit Court or the Court of Claims, depended only upon the consent of the United States, they not being amenable to suit except by such consent. Having consented to be sued in the Court of Claims upon any claim founded upon a law of Congress, there is no more reason why the jurisdiction of the court should not be exercised when a state is a party than when a private person is the suitor. The statute makes no exception of this kind, and this court can create none.' United States v. Louisiana, 123 U. S. 32, 36, 8 S. Ct. 17, 19, 31 L. Ed. 69. In the case we have here, Congress has authorized the United States to bring this suit under Section 41, title 28, U. S. C. A., and, when it did so, consent was given to any one, who may have an interest in the litigation of such a nature as to become a necessary party, to appear and have his rights determined."

We have stated that if appellee, at the time this suit was brought, was of the view that the asserted rights of the states, which were known, manifest and of long standing, could not be litigated in the district court even with their consent, it could have brought an original suit in the Supreme Court of the United States and made either or both states defendants and had the whole controversy litigated. This was done in United States v. Texas,

supra. There the United States claimed title to certain lands and the State of Texas made claim to the same lands. The United States brought an original suit in the Supreme Court to establish its asserted title and have it quieted as against the claims of the State of Texas. The controversy there was in every essential aspect like the controversy here. The jurisdiction of the Court to entertain and decide the controversy was sustained.

The same procedure was followed in United States v. Oregon, supra, which was a suit by the United States against the State of Oregon to quiet title to the beds of certain lakes in Harney County, Oregon, to which the state asserted title. The case was decided in April, 1935.

Neither the State of Oregon nor the State of Washington can sue the United States, either in the Supreme Court of the United States or in any other court, without its consent, and we find no statute by which the Congress have given consent that the United States may be sued in this type of case. It has been the uniform holding of the Supreme Court of the United States that the government is not subject to suit without its consent, that its consent can be expressed only by statute, and that the courts cannot go beyond the letter of such consent as expressed by statute. See Kansas v. United States; Minnesota v. Hitchcock; Oregon v.

Hitchcock; State ex rel North Dakota v. Railroad Commission; United States v. Turner, supra.

An interesting application of the rule, and the strictness with which it is applied, is exhibited in United States v. Turner, supra, a decision by the Circuit Court of Appeals of the 8th Circuit. Turner brought a suit against the United States in the United States District Court in North Dakota, to quiet title to certain lands. The United States, through its District Attorney, answered to the merits and went to trial, and a decree was entered in favor of Turner. Thereafter, the United States filed a motion to vacate the decree, which was overruled by the District Court. The Circuit Court of Appeals held that there was no statute by which consent of the United States was given to be sued, and that the decree was void.

There is, therefore, no court to which either state may go to litigate its asserted title to the premises in question. If the decree in this suit stands, the states are wholly without remedy. They can never litigate their asserted titles unless at some time in the future the Congress, by statute, permits them to bring suit.

If intervention by the states would oust the Court of jurisdiction, which we deny, that would afford no ground or reason for proceeding in this suit to a decree in the absence of the states.

California v. Southern Pacific Co., 157 U. .S 229, 39 L. Ed. 683.

New Mexico v. Lane, 243 U. S. 52, 58, 61 L. Ed. 588, 591.

C. M. & St. P. Co. v. Adams County, et al., 72 Fed. (2d) 816.

Himes v. Schmehl, 257 Fed. 69, 71.

United States v. Bean, 253 Fed. 1, 6.

Land Co. v. Elkins, 20 Fed. 545.

21 C. J. 276.

ARGUMENT

It may be contended by appellee in this Court, as it was contended in the trial court, that intervention by the States of Oregon and Washingon would oust the court of jurisdiction. We will presently show that this contention, if made, finds no support in the decided cases. But, suppose we grant the contention for the sake of argument. That does not meet the situation presented by this record. In equity and good conscience, and with due regard for the known and asserted claims of the states, the trial court should not have passed

a decree which materially and injuriously affected their asserted rights. It is no answer to say that, if the states were made parties, and thus permitted to litigate their rights, the court could not have passed any decree because it would have been without jurisdiction. The absence of indispensable parties is not excused, the objection to the court proceeding without their presence in a suit is not obviated, because the court would have no jurisdiction to proceed if they were made parties.

The last paragraph of the syllabus to California v. Southern Pacific Co., supra, sums up the rule thus:

> "Where there are indispensable parties that are not made parties to a suit in equity in this court, and the making them parties would oust its jurisdiction, the suit will be dismissed for want of such parties who should be joined but cannot be without ousting the jurisdiction."

In New Mexico v. Lane, et al., supra, the court pointed out that Keepers, who claimed an interest in the land in controversy, was not a party, that he was a citizen of New Mexico, that to make him a party would oust the court of jurisdiction, and cited and applied the rule in California v. Southern Pacific Co., supra.

In Chicago, M. & St. P. Co. v. Adams County, et al., supra, this Court quoted with approval the following extract from Story:

> "The established practice of courts of equity to dismiss the plaintiff's bill, if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter, who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, sua sponte, though not raised by the pleadings or suggested by counsel,"

and in support of this rule the Court cites Gregory v. Stetson, California v. Southern Pacific Co., supra, and other cases.

In Himes v. Schmehl, supra, the Court said:

> "The bill does not allege any reason for the non-joinder of Seymour, but plaintiff seeks to excuse his non-joinder, in that his joinder would oust the jurisdiction of the court as to the parties before the court. That consequence cannot make it regular to proceed without him. It only proves that the court below was not the proper tribunal to settle the controversy. If it be once settled that the suit may not be maintained, save by the joinder of Seymour as a party, Himes cannot set up the limited jurisdiction of the court for not so joining him. Parsons et al. v. Howard, Fed. Cas. No. 10,777. Nor can this result be affected by equity rule 39 (198 Fed. xxix, 115 C. C. A. xxix). California v. Southern Pacific Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683."

And in United States v. Bean, supra, the Court said:

> " 'The established practice of courts of equity to dismiss the plaintiff's bill,' says the Supreme

Court in Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 22 Sup. Ct. 308, 322 (46 L. Ed. 499), 'if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court sua sponte, though not raised by the pleadings or suggested by the counsel. Shields v. Barrow, 17 How. 130 (15 L. Ed. 158); Hipp v. Babin, 19 How. 271, 278 (15 L. Ed. 633); Parker v. Winniposeogee Lake Cotton & Woolen Co., 2 Black 545 (17 L. Ed. 333).' To the same effect is the opinion of this court in Hawes v. First Nat. Bank, 229 Fed. 51, 57, 59, 143 C. C. A. 645, 651, 653.

"It is a familiar and just rule that no court may directly adjudicate a person's claim of right, unless he is actually or constructively before it. It is an established rule of practice in the conduct of suits in equity in the federal courts that every indispensable party must be brought into the court or the suit must be dismissed. And an indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

In 21 C. J. 276, the rule is thus stated:

"Where a necessary and indispensable party as here defined is out of the jurisdiction of the court, or for some other reason cannot be brought before the court, the court cannot proceed, but must dismiss the bill, and plaintiff

is remediless, for the suit is unavoidably defective. The burden is on the plaintiff to bring in all parties necessary to the granting of the relief sought, and it is his misfortune if he is unable to do so. The rule of exception permitting the omission, in certain cases, of parties who cannot be brought in, does not apply to indispensable parties."

Intervention by the States of Oregon and Washington would not have ousted the trial court of jurisdiction.

Clark v. Barnard, 108 U. S. 436, 27 L. Ed. 780, 784.

Brewer-Elliott, etc., Co. v. U. S., 260 U. S. 77, 67 L. Ed. 140.

Porto Rico v. Ramos, 232 U. S. 627, 631, 58 L. Ed. 763, 765.

Gunter v. Atlantic Coast Line Co., 200 U. S. 273, 284, 50 L. Ed. 484.

St. Louis v. Yates, 23 Fed. (2d) 283, 284.

Missouri v. Fiske, 290 U. S. 18, 24, 78 L. Ed. 145, 151.

U. S. v. Ladley, 51 Fed. (2d) 756-759.

ARGUMENT

The learned trial court, as we have seen, denied the petitions of the States of Oregon and Washington to intervene, mainly, if not wholly, on the ground that the Supreme Court of the United States was vested with exclusive jurisdiction to try controversies between the United States and the states affecting ownership of property, and that if interventions by the states were permitted the jurisdiction of the court would be ousted. The trial court reached exactly the opposite conclusion in the Ladley case, supra.

In Clark v. Barnard, supra, it was insisted that the suit, although in form against the General Treasurer of the State of Rhode Island, was in legal effect a suit against the state and that the court had no jurisdiction. The state voluntarily appeared as an intervening claimant to the fund in controversy. The Supreme Court thus disposed of the contention that the trial court was without jurisdiction:

> "We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant of the fund in court. The immunity from suit belonging to a state, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure;

> so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case, the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the state and the appellees to the fund, to which both claimed title."

Brewer-Elliott, etc., Co. v. United States, supra, was a suit brought by the United States in behalf of itself and as trustee for the Osage tribe of Indians, against the Brewer-Elliott Company and others, lessees, under oil and gas leases executed to them, or to their assignors, by the State of Oklahoma. The bill alleged that the property thus leased belonged to the Osage tribe and prayed for a decree quieting title to the property in the United States as trustee and enjoining the defendants from going upon the premises. The case is very much like the one at bar. The State of Oklahoma petitioned for leave to intervene, and intervention was allowed. The contest from then on was between

the United States upon the one hand and Oklahoma on the other. The case went to final decree in favor of the government, and on reaching the Supreme Court the decree was affirmed. While the question of jurisdiction was not raised, it is not to be supposed that the trial court, Circuit Court of Appeals and the Supreme Court, would have failed to notice their own lack of jurisdiction, by reason of the intervention of the State of Oklahoma, if jurisdiction were lacking. Indeed, the learned trial judge who sat in this case, in his decision in the Ladley case, in which intervention by the State of Idaho was allowed, referred to the Oklahoma case as a precedent in this very apt language (p. 759):

> "The proceeding here is identical with the proceeding adopted in the case of Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 43 S. Ct. 60, 67 L. Ed. 140, where the United States brought suit as trustee for the Osage tribe of Indians against certain oil companies to cancel oil and gas leases granted by the State of Oklahoma covering lands constituting part of the bed of the Arkansas river within the Osage reservation. The State of Oklahoma intervened by leave of court and denied that the United States, as trustee, or the Osage tribe, owned the river bed of which the lots were a part, and averred that they were owned by the state in fee. It can hardly be said that in that case the court or counsel overlooked the preliminary question of jurisdiction where the United States and the state were parties, for it is said in the case of

> Minnesota v. Hitchcock, 185 U. S. 373, 22 S. Ct. 650, 654, 46 L. Ed. 954, that: 'It is the duty of every court of its own motion to inquire into the matter, irrespective of the wishes of the parties, and be careful that it exercised no powers save those conferred by law.' "

Porto Rico v. Ramos, supra, was a suit brought in the District Court of the United States for Porto Rico. It involved title to land. Porto Rico asserted rights in the property and petitioned for, and was granted, leave to intervene and be made a defendant. Thereafter, Porto Rico asserted that the Court had no jurisdiction to litigate its rights because of its sovereign capacity. The court held that when Porto Rico, on its petition for leave to intervene, was made a party, it waived its immunity and consented to the jurisdiction of the court and was bound by the decree entered. The holding is epitomized in the first paragraph of the syllabus in this language:

> "Porto Rico cannot invoke its immunity from suit without its consent to defeat jurisdiction of an action in which, through its Attorney General, it voluntarily petitioned, after due deliberation, to be made a party defendant, asserting rights to the property in dispute, and in which it was made such party against the plaintiff's opposition."

In Gunter v. Atlantic Coast Line Co., supra (p. 585), the Court said:

> "Although a state may not be sued without its consent, such immunity is a privilege which may be waived; and hence, where a state voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the results of its own voluntary act by invoking the prohibitions of the 11th amendment."

And in the recent case of Missouri v. Fiske, supra (p. 28), the Court said:

> "The fact that a suit in a Federal Court is in rem, or quasi in rem, furnishes no ground for the issue of process against a non-consenting state. If the state chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the state may be permitted to do so, and in that event, its rights will receive the same consideration as those of other parties in interest."

In St. Louis, etc., Co. v. Yates, supra (p. 284), a decision by the Circuit Court of Appeals of the 8th Circuit, it appeared that suit had been brought against Yates as tax collector of an Arkansas county, that the State of Arkansas and another filed petitions for leave to intervene, and leave was granted. Thereafter, the suit went to decree on the merits against complainant. It was urged by complainant on appeal that the court erred in permitting the State of Arkansas and the City of Texarkana to intervene, that the state should not have been made a party, and that when the state

was made a party the court lost jurisdiction. Rejecting this contention, the Court said:

> "Article 5, Section 20, of that Constitution (of Arkansas) provides that, 'the State of Arkansas shall never be made defendant in any of her courts.' We are not cited to any Arkansas Supreme Court decisions construing this section. We think it should be construed to mean that the state cannot be compelled to defend in any action in a court of that state, but that the state may voluntarily appear and ask to be made a party in any action, either in the State or Federal courts."

Finally, it should be observed that after the Court had denied the petition of each state for leave to intervene, application was made in behalf of each state for leave to produce and examine witnesses and to submit argument. This also was denied (Tr., p. 96). Appellants were lessees of the State of Washington. They claimed no title.

Here we have a case of the State of Washington, who asserted title to the premises in controversy, and who was the lessor of appellants, denied the right to intervene and denied the right to in any way participate in or be heard in the suit.

The trial court did not exercise its discretion, if it had any in this case, in denying the petition for leave to intervene.

Hernan v. American Bridge Co., 167 Fed. 930, 934.

Felton v. Spiro, 78 Fed. 576.

Mattox v. U. S., 146 U. S. 140, 36 L. Ed. 917.

4 C. J. 798.

ARGUMENT

If it be contended that the granting or refusing of a petition for leave to intervene rests in the discretion of the trial court, the answer is that the trial court did not exercise its discretion. Its oral opinion denying the petitions for leave to intervene (Tr., pp. 92, et seq) shows that the petitions were denied because the Court was of the view that it had no jurisdiction to grant such petitions, that exclusive jurisdiction in controversies concerning title to real estate, between the United States upon the one hand and a state on the other, was vested in the Supreme Court, and that to allow intervention would oust the Court of jurisdiction. It is clear the Court declined to exercise its discretion because it was of the view that it had no legal discretion in the matter. In this situation, the order of the trial court declining to permit

intervention will not be sustained as the exercise of discretion.

In Hernan v. American Bridge Co., supra, a decision by the Circuit Court of Appeals of the Sixth Circuit, it appeared that the trial court refused an application to amend a pleading upon the ground that it had no authority so to do. The Appellate Court held that the trial court had authority to allow the amendment, should have done so, and reversed the judgment. We quote from the opinion:

> "The granting leave to amend is ordinarily a matter addressed to the discretion of the Court, and its determination is for that reason not reviewable. This we have many times held. But where it appears that the Court's discretion was not exercised because of a supposed lack of authority, it is shown that the party has been denied his legal right to require the Court to entertain the question on its merits; and in such case the foundation for a writ of error is laid. Felton v. Spiro, 78 Fed. 576, 24 C. C. A. 321; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917."

Felton v. Spiro, supra, is a decision by the Circuit Court of Appeals of the Sixth Circuit, written by Judge Taft. There had been a verdict and judgment in the lower court and a motion for new trial was made, which was denied. The Appellate Court was of the opinion that the trial court had denied the motion for a new trial for supposed

lack of authority to set aside a verdict for insufficiency of the evidence. It was held that the trial court had such authority, that it had not exercised its discretion in determining whether the motion should be allowed and reversed the case with instructions to pass on the motion insofar as it was based on insufficiency of the evidence to support the verdict. The Court said, in part:

> "If now, in exercising this discretion, it is the duty of the court to consider whether the verdict was against the great weight of evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so, it is clear to us he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error."

And, in support of its decision, the Court cited the Mattox case, supra.

In 4 C. J. 798, it is said:

> "Where the trial court refuses to exercise a discretion vested in it on the supposed ground of want of power, judgment will ordinarily be reversed to the end that the discretion shall be exercised."

The right to intervene in this case on the part of the States of Oregon and Washington was absolute and did not rest in the discretion of the trial court.

Richfield Oil Co. v. Western Machinery Co., 279 Fed. 852, 855.

Central Trust Co. v. Chicago, etc., Co., 218 Fed. 336, 339.

Palmer v. Bankers Trust Co., 12 Fed. (2d) 747, 752.

Gaines v. Clark, 275 Fed. 1017, 1019.

California Cooperative Canneries v. U. S., 299 Fed. 908, 913.

ARGUMENT

When it is considered that neither the State of Washington nor the State of Oregon can sue the United States in any court, and therefore cannot litigate their claims of title against the United States, what was said by this Court in Richfield Oil Co. v. Western Machinery Co., supra, is very apt and pertinent. This Court, in that case, said:

> "Of course, the general rule is that an application to intervene is addressed to the sound discretion of the court. Credits Com. Co. v. United States, 177 U. S. 316, 20 Sup. Ct. 636, 44 L. Ed. 782. But that rule is founded upon

> the assumption that the petitioner for intervention has other and adequate means of redress available to him, and therefore it is not unjust to him to rule that the main controversy should be proceeded with, freed of the complication injected by his assertions. * * * But, on the other hand, if one presents a situation where he will lose a meritorious claim unless he can obtain relief by coming into the main suit, to say that he may not intervene, is to deprive him of the only way by which he can have an opportunity to be heard. This would be equivalent to holding that, notwithstanding the fact that one has a direct interest in the litigation and the subject-matter thereof, and who shows that he is remediless unless he can assert his claim, has no absolute right to be heard, and must abide the discretion of the court, which may be exercised adversely to him, and so deprive him of any relief whatsoever."

In Palmer v. Bankers Trust Co., supra, the court used this language, peculiarly applicable here:

> "In some cases the facts and circumstances may be such that to deny the intervention would be error on the part of the chancellor; for example, where the petitioner, not being already fairly represented in the litigation, is asserting a right which would be lost or substantially affected if it could not be asserted at that time and in that form. In such cases the right of intervention is often termed absolute." (Citing cases).

In Gaines v. Clark, supra, the Court said:

> "Wide discretion is vested in the chancellor in permitting or refusing leave to intervene in

a proceeding in equity. But this discretion is not absolute. If the party seeking intervention will not be left without a remedy in the suit in which leave to intervene is sought, the granting or refusal will usually be deemed discretionary with the court. But, if the party seeking intervention shows ownership in or a lien against the res which is the subject of litigation, and he is without remedy elsewhere to protect his right, the court should not refuse leave to intervene."

And in California Cooperative Canneries v. U. S., supra, the Court said:

"* * * The discretion of the chancellor in permitting or refusing intervention is by no means absolute. If the party seeking intervention shows such an interest in the litigation as to involve the protection of valuable rights and is without remedy elsewhere, the court should not refuse leave to intervene."

The evidence wholly fails to sustain the findings and decree that appellee is the owner of the lands in dispute, or that they are accretions to Sand Island.

POINTS AND AUTHORITIES

(a) Upon their admission to the Union, Oregon and Washington, each, became vested with title

to the beds and banks to high water mark of all navigable waters within her boundaries.

Bowlby v. Shively, 22 Or. 410.

Shively v. Bowlby, 152 U. S. 1, 38 L. Ed. 331.

Hume v. Rogue River Packing Co., 51 Or. 237, 85 Pac. 391.

Pacific Elevator Co. v. Portland, 65 Or. 349, 133 Pac. 72.

Brace, etc., Mill Co. v. State, 49 Wash. 326, 95 Pac. 278.

Newell v. Abey, 77 Wash. 182, 137 Pac. 811.

(b) Title to the beds and banks of the navigable waters carries with it title to all tide lands, tide flats and like formations, and these the state owns, subject, of course, to the public right of navigation, and may sell, lease or otherwise dispose of.

See cases cited, supra, under Point (a), and

Taylor Sands Fishing Co. v. Benson, 56 Or. 157, 108 Pac. 126.

Van Dusen Investment Co. v. Western Fishing Co., 63 Or. 7, 124 Pac. 677, 126 Pac. 604.

(c) Tide lands and tide flats are lands above low water covered and uncovered by the flux and reflux of the tide.

Hardy v. California Trojan Powder Co., 109 Or. 76, 81, 219 Pac. 197.

Pac. Elevator Co. v. Portland, supra.

Taylor Sands Fishing Co. v. Benson, supra.

Van Dusen Investment Co. v. Western Fishing Co., supra.

(d) Accretions to tide lands above low water are governed by the same rule as accretions to the land of any other littoral proprietor.

Van Dusen Investment Co. v. Western Fishing Co., supra.

Taylor Sands Fishing Co. v. Benson, supra.

Fellman v. Tidewater Mill Co., 78 Or. 1, 152 Pac. 268.

(e) Title to tide flats, sand bars, tide lands, etc., follows them, if through the processes of attrition and accretion they move to new locations, and if in their mutations they preserve a substantial identity.

Taylor Sands Fishing Co. v. Benson, supra.

Van Dusen Investment Co. v. Western Fishing Co., supra.

Fellman v. Tidewater Mill Co., supra.

(f) Accretion is a gradual, imperceptible addition to the land of a littoral proprietor by the action of water; it is a slow, insensible abstraction of

particles from one place and depositing them in another. If a change is sudden, rapid, visible, as the result of storms, freshets, or other known or obvious cause, there is no change in ownership, property line or boundary.

Nebraska v. Iowa, 143 U. S. 349, 36 L. Ed. 186.

Washington v. Oregon, 211 U. S. 135, 136, 53 L. Ed. 118.

S. C., 214 U. S. 205, 215, 53 L. Ed. 965.

Taylor Sands Fishing Co. v. Benson, supra.

Sundial Ranch Co. v. May Land Co., 61 Or. 205, 216, 119 Pac. 758.

Spinning v. Pugh, 65 Wash. 470, 118 Pac. 635.

Harper v. Holston, 119 Wash. 436, 205 Pac. 1062.

Katz v. Patterson, 135 Or. 449, 452, 296 Pac. 54.

Holman v. Hodges, 112 Iowa 714, 84 N. W. 950, 58 L. R. A. 673.

Bouchard v. Abrahamsen, 160 Cal. 792, 118 Pac. 233.

Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N.S.) 162.

People v. Warner, 116 Mich. 228, 239, 74 N. W. 705.

45 C. J. 527, 528, 563, 564.

ARGUMENT

The foregoing points are in truth, but subdivisions of one general proposition, and will be discussed together. We will first discuss them and then proceed to a consideration of the evidence.

The claim of the appellee, simply stated, is that a large body of land, all above low water all the time, which by accretions to it built towards and made contact with Sand Island immediately became an accretion to Sand Island when the contact was made. One would suppose this claim must be based on the theory that tide lands or tide flats are not the subject of ownership, that accretions to them are not within the general rule applicable to accretions to upland, and that when any tide lands or tide flats, through accretions to them, join with another body of land which may be partly above high water, they become an accretion to the latter. This theory has interesting implications. We suppose that, if the channel which now cuts across Peacock Spit northeasterly to southwesterly and which has existed as a charted channel for a couple of years, was to shoal up, appellee would claim all of the Peacock Spit up to the main land of Cape Disappointment as an accretion, just as it now claims that part of Peacock Spit which lies south and east of this new formed channel. And as the

Baker Bay area shoals up, as it is doing rapidly, appellee may claim, according to the same theory, that whole area, north, northwest, northeast to the Washington shore line as an accretion to Sand Island and all this may be claimed as an increment —unearned to be sure—to the grant of a small tide flat by the State of Oregon in 1864, situated several miles from the present location of Sand Island.

The original grant by Oregon to the United States, so far as here material, reads:

> "All right or interest of the State of Oregon * * * to Sand Island, situate at the mouth of the Columbia in this state; the said Island being subject to overflow between high and low tide."

At the time of the grant, Sand Island was a small tide flat located a considerable distance southeast of its present location. The maps of 1852 and 1870 (Govt.'s Ex. 1) will give a pretty good idea of the location and size of the Island in 1852 and the changes in its location and outline between then and 1870. The ater maps will show the progressive movement of the Island towards the northwest up until about 1914 or 1915, and during this time, it increased in size, changed its outlines and built up so that a considerable part is always above ordinary high water.

In Washington v. Oregon, 211 U. S. 127, 132, the Court, speaking of Sand Island, said:

> "It is called an island, but it was little more than a sand bar. By the action of the waters it had been gradually moving northward, but the general configuration of the mouth of the river was unchanged. Since then the movement of Sand Island has continued, the north channel has been growing more shallow, and the southern channel has become the one most used."

This movement of Sand Island is shown on a chart, made a part of the opinion of the Supreme Court.

In United States as Trustee, etc., v. McGowan, and same v. Baker's Bay Fish Co., 62 Fed. (2d) 955, 956, this Court said:

> "Sand Island, shown on the map of 1854, has gradually moved by the process of accretion and attrition, until it is now less than half a mile directly east of Sand Island (Cape Disappointment?) and has grown in size from less than one-half mile to more than two miles in length. Peacock Spit is bare at high tide. It is a relatively recent growth, although shoal water extending southwesterly (not southeasterly as at present) from Cape Disappointment had been long known as Peacock Spit by reason of the wreck of a ship of that name in that location. Such a shoal is first shown on the Coast Survey Map of 1851. As early as 1885, there was a small island dry at low tide, immediately south of the present location of Peacock Spit, and extended to a very small extent into the area now occupied by Peacock Spit. This island had completely disappeared before Peacock Spit emerged from the water in that location. Sand Island, by 1885, had

> moved to approximately its present position, being about half a mile further east than its present location. Under these circumstances it is, of course, not contended that the Quinaielt Indians ever fished from Peacock Spit as a usual and accustomed fishing place. Since it was formed it has been leased by the State of Washington to the appellee, Baker's Bay Fish Company at an annual rental of $36,000; the lease having been secured by that company in pursuance of its bid at public auction. * * *"

Appellee owns Sand Island today, increased in size and at its new location, because of a rule of property in Oregon that accretions to tide flats are governed by the same law as accretions to upland, and because of another rule of property that title to tide flats follow them to a new location, if in their mutations they observe a substantial identity.

Oregon, upon her admission to the Union, became vested with title to the bed and banks to high water mark of all navigable waters within the state. This included all tide lands, tide flats, sand islands and other like formations in these navigable waters. This was the rule of property declared by the Supreme Court of Oregon in Bowlby v. Shively, 22 Or. 410, and affirmed by the Supreme Court of the United States in Shively v. Bowlby, 152 U. S. 1, 59, 38 L. Ed. 331. The rule of property in the State of Washington is the same.

See decisions of the Supreme Court of that state cited under Point (a), supra.

In Shively v. Bowlby, supra, the Supreme Court of the United States said (p. 57):

> "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and the control of them are vested in the sovereign for the benefit of the whole people.
>
> "At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states, within their respective borders, subject to the rights surrendered by the Constitution to the United States.
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> * * * *
>
> "The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution."

In Hume v. Rogue River Packing Co., 51 Or. 237, 246, the Court said:

> "By virtue of its sovereignty, the state, upon its admission into the Union, became vested with the title to all the shores of the sea and arms of the sea covered and uncovered by the ebb and flow of the tide, usually called tide lands (Hinman v. Warren, 6 Or. 418; Bowlby v. Shively, 22 Or. 410; 30 Pac. 154), as well as of the land under all of the navigable waters within the state; subject, however, to the public right of navigation and to the common right of the citizens of the state to fish therein; Martin v. Waddell, 41 U. S. (16 Pet.) 367 (10 L. Ed. 997); Shively v. Bowlby, 152 U. S. (45 Davis) 1 (14 Sup. Ct. 548; 38 L. Ed. 331); Knight v. United States Land Assoc. 142 U. S. 161 (12 Sup. Ct. 258; 35 L. Ed. 974).
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> * * * *
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> "By the law of this state, as declared and established by this court, the owner of upland bordering on navigable water has no title in the adjoining lands below high water mark, nor any rights in or over the adjoining waters as appurtenant thereto: Hinman v. Warren, 6 Or. 418; Parker v. Taylor, 7 Or. 435; Parker v. Rogers, 8 Or. 183; Shively v. Parker, 9 Or. 500; McCann v. Oregon Ry. Co., 13 Or. 455 (11 Pac. 236); Bowlby v. Shivley, 22 Or. 410 (30 Pac. 154)."

It follows, of course, that the title to the bed and banks of navigable waters carries with it all tide lands, tide flats and like formations which the state may sell, lease or otherwise dispose of. See cases cited under Point (b), supra.

At an early day the Oregon Legislative Assembly made provision for the sale of tide lands. It was later held (Elliott v. Stewart, 15 Or. 259, 14 Pac. 416), that this legislation did not authorize the sale of tide lands not connected with the shore. In the meantime, however, conveyances had been made by the State Land Board to sundry persons of tide lands in the Columbia River not connected with the shore. In 1891 (Ore. Laws, 1891, p. 189), the State Land Board was authorized

> "to sell the remaining unsold tide and swamp lands, including tide flats not adjacent to the shore and situate within the tide waters of the Columbia River and Coos Bay."

The Act also confirmed title to all tide flats in the Columbia River and Coos Bay theretofore conveyed by the state. In 1907, the Legislative Assembly (Ore. Laws, 1907, p. 206, Chap. 117) provided for the classification, control, leasing, sale and other disposition of land owned by the state. Among the categories were

> "All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide and all islands, shore lands, and other such lands held by the state by virtue of her sovereignty."

The same classification was carried into existing statutes; Section 60-301, subdivision (f); Oregon Code, 1930.

Authority to sell tide lands and tide flats not connected with the shore was suspended for ten years in 1907 (Ore. Laws, 1917, Chap. 202 p. 312). In 1917 this law was again amended to suspend the right to sell until 1937 (Ore. Laws, 1927, Chap. 177, p. 200). The authority to lease was not restricted.

All tide and overflow lands belonging to the state may be leased to the highest bidder in Oregon (Sec. 60-312, Oregon Code, 1930).

It is provided by statute in Washington that:

> "Public lands of the State of Washington are lands belonging to or held in trust by the state, which are not devoted to or reserved for a particular use by law, and include state lands, tide lands, shore lands, and harbor areas as hereinafter defined, and the beds of navigable waters belonging to the state." (Rem. Comp. Statutes, 1927, Supp. Sec. 7797-1).

Provision is made for leasing tide and shore lands and other lands (Rem. Comp. Statutes, 1927, Supp., Secs. 7797-22, 7797-59, 7797-73).

Tide lands and tide flats are lands above low water covered and uncovered by the flux and reflux of the tide. In Hardy v. California Trojan Powder Co., 109 Or. 76, 81, 219 Pac. 197, it was said:

> " 'Tide land' is a descriptive phrase, applied to lands covered and uncovered by the ordinary

tides, and has been frequently defined by this court." (Citing many cases.)

See also cases cited under Point (c), supra.

Accretions to tide lands and tide flats above low water are governed by the same rule as accretions to the land of any other littoral propretor.

Taylor Sands Fishing Co. v. Benson, 56 Or. 157, 108 Pac. 126, was a suit to enjoin the State Land Board from leasing certain tide lands in the Columbia River. Plaintiff acquired title to said tide lands through mesne conveyances by the State of Oregon, upon which it was landing drag seines. There had been accretions to the lands purchased by it which the State Land Board was proposing to lease to another and it prayed for an injunction. The Court pointed out that under legislation existing at the time of the conveyance by the state, it was authorized to grant a fee simple title to tide lands. At the time of the original conveyance by the state, and at the time the suit was filed, the land conveyed was below high water, but was covered and uncovered by the flux and reflux of the tide. The Court said:

"The title being thus vested, the remaining questions to be considered are whether or not the area of the premises can be augmented by accretions, and, if so, can the defendants, who are officers of the state, be enjoined from leasing such gradual accumulations of the soil."

The Court answered both questions in the affirmative, in part, saying:

> "The defendants' counsel, invoking an allegation of the complaint that the tide lands therein described are covered by water to a depth of four to six feet for a large part of each day, insist that the premises are not part of an island, but are a shoal, and, such being the case, the land so designated by metes and bounds, cannot be enlarged by accretions. This averment should be construed in connection with another allegation of the plaintiff's pleading, to the effect that it is the owner of all the tide lands so mentioned which are 'lying between ordinary high and low tide line in the Columbia River'. The common high water mark, occurring in places where the alternate rising and falling of the ocean and of bays and rivers affected by it twice in each lunar day, means a line on the shore which is reached by the limit of the flux of the usual tide. Interpreting in pari materia such clauses, it is reasonably to be inferred therefrom that the tide lands mentioned are a part of an island.
>
> "If, however, it should subsequently appear from testimony to be given that such lands constitute a sand bar which is wholly covered by water at each high tide, we do not think the overflow of the premises would render them incapable of enlargement by accretions; for, as was said by Mr. Justice Burch, in Fowler v. Wood, 73 Kan. 511, 549, 85 Pac. 763, 776 (6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534): 'It is not necessary to give a formation on the bed of a river a specific name in order that proprietary rights may attach to it. In many states lands totally or partially submerged

are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes. Islands that arise from the beds of streams usually first present themselves as bars. * * * Before it will support vegetation of any kind, a bar may become valuable for fishing, for hunting, as a shooting park, for the harvest of ice, for pumping sand, and for many other well-recognized objects of human interest and industry. If further deposits of alluvion upon the borders would make it more valuable, no reason is apparent why the law of accretion should not apply.' * * * If it were conceded that imperceptible accumulations of soil by natural causes were not a part of such tide lands, it would necessarily follow that each addition thereto of earthy matter would belong to Oregon, and, notwithstanding a prior lease of the alluvion, for the purpose of fishing, had been consummated and the term unexpired, the state could let the accretions which always border the stream, thereby rendering valueless the prior disposal, and making a lease for a specific term a tenancy at the will of the lessor. As the consequences supposed would be so disastrous to all tenants but the last, we think reason supports the assertion that the plaintiff is entitled to the accretions, if any have been made, to its tide lands. Hume v. Rogue River Packing Co., 51 Or. 237, 243, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865."

See also cases cited under Point (d), supra.

Title to tide lands, tide flats, sand bars, etc., in the navigable waters of Oregon follows them, if through the processes of attrition and accretion,

they move to new locations and in their mutations preserve a substantial identity.

In Van Dusen Investment Co. v. Western Fishing Co., 63 Or. 7, 18, 124 Pac. 677, the Court said:

> "The owners of tract No. 1 are entitled to the accretion that lodged on and thus formed a part of such tide flats. Taylor Sands Fishing Co. v. State Land Board, 56 Or. 157 (108 Pac. 126). The tideland island as originally granted, has gradually moved westward, and no part of it is now exposed at low tide within the description given in the confirmatory deed. The title of Hobson and Van Dusen and of their successors in interest extended to all accretions made to such land, and, though the surface of the original island may have been washed away, the possession of the whole tract of such imperceptible deposits of earth, sand, and gravel, follows the paper title."

See also cases cited under Point (e), supra.

"Accretion" is a term describing a gradual, imperceptible addition to land by the action of waters. It is a slow, insensible abstraction of particles from one place and depositing them in another. If the change is perceptible, rapid, visible, as the result of storms, freshets or other known or obvious cause, there is no change in ownership, property lines or boundaries.

Title to islands formed on the bed of navigable waters and tide lands, tide flats and like formations, follows title to the bed. If any such forma-

tion extends its boundaries by accretions until it reaches the shore, or the land of another owner, it will not become the property of the latter. If not granted away, it remains the property of the state and the boundary line between the two bodies of land will be where they meet. This is so even though the process of building up of the one tract, or the other, or both, finally closes a channel which may have existed between the two bodies of land.

A sudden, perceptible change in the course of navigable waters by which all or a part of the current of the stream seeks a new bed or channel, works no change of boundary, the boundary remains as it was, in the center of the old channel, although it may be entirely closed.

In Nebraska v. Iowa, 143 U. S. 359, 365, 36 L. Ed. 186, the Court quoted with approval the following from Vattel (p. 365):

> " 'If a territory which terminates on a river has no other boundary than that river, it is one of those territories that have natural and indeterminate bounds (territoria arcifinia), and it enjoys the right of alluvion; that is to say, every gradual increase of soil, every addition which the current of the river may make to its bank on that side, is an addition to that territory, stands in the same predicament with it, and belongs to the same owner. For, if I take possession of a piece of land, declaring that I will have for its boundary the river which washes its side—or if it is given to me upon

that footing, I thus acquired beforehand the right of alluvion; and consequently I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land. I say 'insensibly' because, in the very uncommon case called avulsion, when the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner. * * *

" 'But if, instead of a gradual and progressive change of its bed, the river, by an accident merely natural, turns entirely out of its course and runs into one of the two neighboring states, the bed which it has abandoned becomes thenceforward their boundary, and remains the property of the former owner of the river (§ 267), and the river itself is, as it were, annihilated in all that part, while it is reproduced in its new bed and there belongs only to the state in which it flows.' "

"The result of these authorities puts it beyond doubt that accretion on an ordinary river would leave the boundary between two states the varying center of the channel, and that avulsion would establish a fixed boundary, to-wit, the center of the abandoned channel. * * *"

In Washington v. Oregon (211 U. S. 127, 53 L. Ed. 118, 214 U. S. 205, 53 L. Ed. 969), the Court applied the rule declared in Nebraska v. Iowa, and held that the boundary line between the two states, as fixed by Act of Congress, was the middle of the north ship channel which after passing Cape Dis-

appointment, swung northerly and easterly into the Baker Bay area, and, said the Court (p. 135):

> "That remains the boundary, although some other channel may, in the course of time, become so far superior as to be practically the only channel for vessels going in and out of the river. It is true the middle of the north ship channel may vary through the processes of accretion * * *."

and page 136:

> "Concede that today, owing to the gradual changes through accretion, the north channel has become much less important, and seldom, if ever, used by vessels of the largest size, yet, when did the condition of the two channels change so far as to justify transferring the boundary to the south channel? When and upon what conditions could it be said that grants of land or of fishery rights made by the one state ceased to be valid because they had passed within the jurisdiction of the other? Has the United States lost title to Sand Island by reason of the change in the main channel? And if by accretion the north should again become the main channel, would the boundary revert to the center of that channel? In other words, does the boundary move from one channel to the other, according to which is, for the time being, the most important, the one most generally used?
>
> "These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the states

> bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter, in the course of years, becomes the most important and properly called the main channel of the river.
>
> * * * *
>
> "Our conclusion, therefore, is in favor of the State of Oregon, and that the boundary between the two states is the center of the north channel, changed only as it may be from time to time through the processes of accretion."

We have seen that the claim of Washington is that the channel between Peacock Spit and Sand Island was the North Ship Channel; and that as the growth of and accretions to Peacock Spit pushed the channel southerly and easterly closer to Sand Island, the middle of that channel continued to be the boundary line; that when, in the heavy storms of 1929, a new channel was cut across Peacock Spit about where the sailing vessel "North Bend" was driven through, this new channel, which in 1933 became the chartered ship channel, was not the result of the gradual, imperceptible processes of accretion, but, rather, the result of avulsion, and did not become the boundary line.

That part of Peacock Spit, the premises in controversy, thus separated from the part which remained attached to Cape Disappointment, retained its form and identity.

We have also seen that the claim of Oregon is that, when accretions to these sands constituting the lower part of what was Peacock Spit, substantially closed the channel between them and Sand Island, the new channel cut across Peacock Spit became the boundary line. We are not here discussing which contention is correct.

In Sundial Ranch v. May Land Co., 61 Or. 205, 216, the Court quoted with approval this statement of the law of accretions (p. 216):

> "'Accretion is the imperceptible accumulation of land by natural causes, and the owner of the property to which the addition is made becomes the owner of such ground, as where land is bounded by a stream of water which changes its course gradually by alluvial formation, the owner of the land still holds the same boundary, including the accumulated soil'—citing Inhabitants of New Orleans v. U. S., 10 Pet. 662, 717 (9 L. Ed. 573)."

In Harper v. Holston, 119 Wash. 436, 205 Pac. 1062, the Court said (p. 1064):

> "Another rule is that, when grants of land border on running water, and the course of the stream is changed by that process known as accretion—that is to say, the gradual washing away on the one side and the gradual building up on the other—the owner's boundary changes with the changing course of the stream. As was said by the Supreme Court of the United States in New Orleans v. United States, 10 Pet. 662, 9 L. Ed. 573:

> "'No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gains.'
>
> "The rule is as much applicable to the government as it is to private individuals. If the government chooses to grant its lands making a running stream one of the boundaries of the grant, it must expect this part of the boundary to change as time goes no. Ordinarily, it gains in one place what it loses in another, and on no principle of justice can it say that it is not to be subjected to the general rule. And such we understand to be the holding of the Supreme Court in Jefferis v. East Omaha Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872.
>
> * * * *
>
> "On the other hand, it is equally the rule that when a stream, which is a boundary, from any cause suddenly abandons its old channel and creates a new one, or suddenly washes from one of its banks a considerable body of land and deposits it on the opposite bank, the boundary does not change with changed course of the stream, but remains as it was before. This sudden and rapid change is termed in law an avulsion, and differs from an accretion in that the one is violent and visible, while the other is gradual, and perceptible only after a lapse of time."

As has already been observed, the rule with respect to accretions to the bed of navigable waters, sand spits, tide flats, islands, etc., is the same as

that applicable to accretions to the main land.

In 45 C. J. 527, 528, it is said:

> "To entitle the riparian owner to the alluvion the accretion must begin from his land and not from some other point so as finally to reach his land. Hence, where his ownership is only to the bank or shore, the accretion must begin at such point. * * *
>
> "Where an island springs up in the midst of a stream, it is an accretion to the soil in the bed of the river, and not to the land of the riparian owner, although it afterward becomes united with the mainland.
>
> * * * *
>
> "The owner of an island is entitled to land added thereto by accretion to the same extent as the owner of land on the shore of the mainland. If the accretion commences with the shore of the island and afterwards extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but if accretions to the island and to the mainland eventually meet, the owner of each owns the accretion to the line of contact."

And in 45 C. J. 563, 564:

> "The ownership of an island generally follows the ownership of the bed of the water, so that if the state or crown owns the land under water, it also owns the island, while if the riparian owner has title to the bed, the island belongs to him up to the line of his ownership of the bed, and if the riparian owner is not the owner of the bed of the stream, he is not the owner of the island, unless it has been granted to him."

In State v. Imlah, 135 Or. 66, 70, 294 Pac. 1046, the Court said:

> "The state's principal contention is that the small island first appearing in 1882, or shortly thereafter, somewhere west of the center of the river continued to exist as an island and to become enlarged by the gradual and imperceptible deposit of sand and gravel upon its outer edges, thereby filling up the channel between it and the west bank and extending the island to the mainland, and that the alluvion thus deposited between the two constituted an accretion to the island and not to the mainland as contended for by the defendants, and as held by the court below in the decree appealed from. If this contention is sustained by the evidence, the rule unquestionably is that where an island arises in a stream, the title to the bed of which is in the state, it does not belong to the owner of either shore. But if it is formed upon a portion of the bed which belongs to a riparian owner, it becomes his property."

Again, in Katz v. Patterson, 135 Or. 449, 452, 296 Pac. 54, where it was claimed by a grantee of tide lands from the state that another close-by sand formation became an accretion to the grant, the Court said:

> "We have seen that this controversy arises upon plaintiff's claim that the land involved is an accretion to the tide island purchased by plaintiff Katz from the state in 1907, while the state contends that the property is a separate island formed on the bed of the Columbia river and hence is the property of the

state. If the land is an accretion to the bed of the Columbia river, the title rests in the state."

See also:

Taylor Sands Fishing Co. v. Benson, 56 Or. 157, 108 Pac. 126.

Fellman v. Tidewater Mill Co., 78 Or. 1; 152 Pac. 268.

Holman v. Hodges, 112 Iowa, 714, 84 N. W. 950, 58 L. R. A. 673, is an interesting and well considered case, and quite in point. Plaintiff owned land bordering on the Mississippi river. Some years after he acquired title, a sand or silt bar began to form in the river opposite his land. This formation originally was entirely separate and distinct from the land of the plaintiff. As time went on its outlines changed and it was enlarged by accretions, until its growth gradually closed up the stream or channel between it and the shore. In Iowa the state owns the beds of the navigable waters within its boundaries. We quote at length from the opinion in this case, because so pertinent here:

"As this island, then, was formed on the bottom of the river, connected in no way with the shores, it would seem that title continued

in the state. It rests on soil which, when beneath the surface of the water, belonged to the state, and, if no longer its property, when was the title divested? The moment the bar appeared above the surface of the water? If so, who acquired it? Surely not the plaintiffs, for at that time a stream 40 or 50 rods wide separated it from their land. And its separation is still marked by a distinct channel to which the waters gradually receded up to 1887, and through which they still flow at the annual freshets. Nor do we think there is any ground for supposing title to shift as suggested. True, Lord Coke referred to what he designated a 'movable freehold', as where the owner of the seashore acquires or loses land as the sea recedes or approaches. See Kent, Com. 11th Ed. 547. In that sense title to land bordering the Missouri river may be said to be movable, for no one at night may safely predict what will be his boundary line the next morning. The state may lose part of the bottom of the stream by accretions to the riparian owner's land, or by reliction. But this is because it occurs through these processes, for the state is governed by rules applicable to the individual owner. That the state acquired title to the soil at the bottom of the stream previously belonging to Nebraska or to private owners, furnishes no ground for depriving it of the property it held. As well say, because of plaintiff's acquiring a large body of land by accretions, they should be dispossessed of that previously owned, or divide it with adjoining owners to the east. The theory of appellants seem to be that, as they may be losers by a future change in the river, this land should be wrested from the state to compensate them for such possible loss. This would be robbing Peter to pay Paul.

There is no more reason for saying the state loses title to an island when connected by accretions to the shore than to say title to an islet formed at one side of the thread in an unnavigable stream is lost when connected with another's land on the opposite side. The thought that title swims out from under an island as new bottom is acquired, is not founded on any sound principle of reasoning. Title is never lost or found in any such evanescent manner. As said in Benson v. Morrow, 61 Mo. 347, the owner of contiguous land is not 'the owner of an island that springs up in the midst of the stream, whether the island be on one side or the other of the thread of the river. He goes only to the margin of the river.' It would also logically follow that if, by accretions to such island, the water margin should unite with the shore, the newly made land would become a part of the island, and the riparian ownership would not be extended. In Cooley v. Golden, 117 Mo. 33, 21 L. R. A. 300, 23 S. W. 104, the same court, after referring to previous decisions, declared that 'it makes no difference in principle that the islands in these cases had been surveyed and disposed of by the United States. The riparian owner would not take the accretion, for the reason that it was not added to his own land. Pole island sprang up in the midst of the stream, far enough from the shore which bounded plaintiff's land to admit at times of the passage of boats between it and the shore. The banks of the island and that of the north shore of the river afterwards united by accretions formed by the washings of the waters, and plaintiff was only entitled to such part thereof as was formed upon his land.' This was followed in Perkins v. Adams, 132 Mo.

131, 33 S. W. 778,— a case in its facts much like the one at bar,— where it is broadly stated that, if the disputed ground was 'not formed to the land on the bank of the river by gradual accretion of land thereto, or by a gradual reliction of the adjoining bed of the river by the receding of the waters, then he (plaintiff) is not entitled to recover, whether the lands be called an island, or a sand bar, or other designation.' The same principle is perspicuously stated by the court of civil appeals of Texas in Victoria v. Schott, 9 Tex. Civ. App. 332, 29 S. W. 681, which we quote with approval: 'The uncontradicted evidence shows that the land thus claimed to be an accretion was formed in the stream as an islet, and that the stream for many years after its formation ran on each side of it. Four or five years since, the water receded from that division of the bed which lay between the islet and the plaintiff's land, and has, since such recession, flowed entirely through the channel east of the islet. Such recession did not change the title to the soil in the islet as it was before. Upon the formation of the islet, the title to it vested and was not changed by the change in the river, as that was not a gradual and imperceptible accretion. The islet, when formed, was an accretion to the soil in the bed of the stream, and the owner of such bed became the owner of the accretion. In navigable streams the soil, and hence all islands formed upon it, belong to the sovereign'."

Bouchard v. Abrahamsen, et al., 160 Cal. 792, 118 Pac. 233, involved a dispute as to the ownership of a formation in the navigable waters of a river in California, variously described as an island,

sand bar, accumulation, etc. The defendant claimed that this formation finally became attached to the main land and thus became by accretion a part of his property as upland proprietor. The court said that if it was not a true island, it certainly was an accumulation in the bed of the river, original title to which belonged to the state, and that if, in the course of time and by the process of shoaling, such island or accumulation became attached to the mainland, the patent to the defendant calling for the meander line of the south bank of the river would not and could not be stretched so as to include this accumulation; and, said the Court:

> "The utmost that defendant could claim in such a case would be the extension of his line to the part of the last vestige of the channel between the island and his land, the accretions of the island belonging to the island, and the accretions upon the south bank belonging to the mainland. * * * Again, it is equally well settled that the accretions to such island or accumulation become a part of the island or accumulation itself."

Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, contains a very elaborate discussion of the law of accretions as applied to the mainland, islands, sand bars and other formations. We quote the following from the opinion (6 L. R. A. (N. S.) 162, at 178):

> "The defendants argue that the so-called island was a mere sand bar; that an island, to

> be worthy of the name, must have become elevated above the bed of the stream far enough to make it fit for agricultural purposes, and that the riparian right of accretion can attach to nothing less dignified. It is not necessary to give a formation on the bed of a river a specific name in order that proprietary rights may attach to it. In many states lands totally or partially submerged are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes. Islands that arise from the beds of streams usually first present themselves as bars. Cooley v. Golden, supra; Cox v. Arnold, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. 592; Perkins v. Adams, 132 Mo. 131, 33 S. W. 778; Hahn v. Dawson, supra; Moore v. Farmer, 156 Mo. 33, 79 Am. St. Rep. 504, 56 S. W. 493; Glassell v. Hansen, 135 Cal. 547, 67 Pac. 964; Holman v. Hodges, 112 Iowa 714, 58 L. R. A. 673, 84 Am. St. Rep. 367, 84 N. W. 950. Before it will support vegetation of any kind, a bar may become valuable for fishing, for hunting, as a shooting park, for the harvest of ice, for pumping sand, and for many other well-recognized objects of human interest and industry. If further deposits of alluvion upon its borders would make it more valuable, no reason is apparent why the law of accretion should not apply."

People v. Warner, 116 Mich. 228, 239, 74 N. W. 705, was an action in ejectment by the state to recover possession of certain lands claimed by it as an accretion. The Court, in part, said:

> "The depth of water upon submerged land is not important in determining the ownership. If the absence of tides upon the lakes, or their

trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked. The adjoining proprietor's fee stops there and there that of the state begins, whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation. The right of navigation is not the only interest that the public, as contra-distinguished from the state, has in these waters. It has also the right to pursue and take fish and wild fowl, which abound in such places; and the act cited has attempted to extend this right over the lands belonging to the state adjoining that portion of the water known to be adapted to their sustenance and increase.

"Upon the subject of accretions, we understand the law to be that additions to the land of a littoral proprietor by the action of the water, which are so gradual as to be imperceptible, become a part of the land, and belong to the owner of the land, but, when not so, they belong to the state. So, if, by the imperceptible accumulation of soil upon the shore of an island belonging to a grantee of the government, or by reliction, it should be enlarged, such person, and not the state, would be the owner; but if an island should first arise out of the water, and afterwards become connected to that of the private proprietor, it would not thereby become the property of such person, but would belong to the state."

EVIDENCE DISCUSSED

The maps in evidence, made by government engineers (Govt.'s Ex. 1), tell the story simply and graphically. They could not be conveniently made a part of the transcript because too numerous and too large. Two additional duplicate sets have been prepared and by stipulation of counsel, will be transmitted to the court for the use of its members in the consideration of the case.

A number of photographs, taken at different times during the past three or four years, also give a very excellent visual picture of conditions (Deft.'s Exhibits 14 to 18, and Exhibit 19A, 19B, 19C and 19D, Tr., pp. 285 to 289).

An examination of these maps will show that in early years conditions in the estuary of the Columbia River and oceanward for some distance, were very unstable. The main ship channel passed to the north of Sand Island and through the Baker's Bay area. There were no jetties or other structures to confine and thus accelerate the currents, or protect the mouth of the river from the full sweep of storms. The vast accumulation of sand and silt some miles out in the ocean beyond the mouth of the river, known as the Columbia bar, had not yet been dredged or cut away by the

confined and swifter currents of later years. There were no channel improvements or maintenance. The normal flow of water in the river carried down vast quantities of material which were greatly added to by seasonal freshets. As a result, there were frequent shiftings of large quantities of sand and silt.

The south jetty was substantially finished in 1913, although improvements and additions have been made since (Tr., p. 231). The north jetty was substantially completed in 1917 (Tr., p. 231), although it has been improved and extended since then. Dikes and revetments have been built from time to time. Channel improvements have been made. There has been constant maintenance work carried forward. All these factors have tended to stabilize conditions.

In this suit we are only concerned with the conditions in later years. Specifically we are concerned with the question: Who owned certain lands in 1931, 1932, 1933, 1934 and 1935. The appellee alleges that during all of that time it was the owner of the premises in controversy, that during the last three years enumerated, appellants trespassed upon and carried on fishing operations on the disputed property.

The 1920 map shows the outlines of Sand Island substantially as they have since existed, except that after 1920 there was a substantial erosion and re-

cession of the west and southwest shore line of the island opposite the land in dispute. This map also shows a considerable body of land built out south and southeasterly from Cape Disappointment and the north jetty. The 1921 map shows this same body of sand and also another body of sand above low water farther to the south and east. It will be observed that the charted channel into Baker's Bay is close to Sand Island and between it and the lands referred to on both maps. The median line of this channel, under the decision in Washington versus Oregon, probably would be the boundary line between the two states. The 1922 map shows a further growth of this body of lands, which it will be observed, are designated as Peacock Spit on these maps. The charted channel is close to Sand Island and between it and these lands. The 1923 map shows a still farther growth of these lands to the south and east, with the channel somewhat narrowed and still along Sand Island and between it and these lands disputed as Peacock Spit. The attention of the Court is invited to a cross shown on the 1923 map, which is about at the southerly tip of Peacock Spit. The 1924 map shows a further building up of Peacock Spit to the south and east, and the point indicated by the cross is now surrounded by land above low water. The channel has been pushed closer to Sand Island. On the 1925 map, Peacock Spit is not substantially changed

in outline, but a considerable part is above high water. On the 1926 map, Peacock Spit still maintains substantially the same outline as on the 1924 and 1925 maps, and there has built up a smaller body of sand still farther east and near the tip of Peacock Spit. However, it will be observed that the channel is not only between Sand Island and Peacock Spit, but between Sand Island and this isolated body of sands. In 1927, about the same situation is shown. It is probable that there was very little water at low water between Peacock Spit and this isolated body of sands referred to, as it was not charted. This means that where clear water is shown without any soundings, it may be that low water is one inch, two inches, or three inches, a foot, or any other depth. It simply indicates that the land is not exposed at low water. The 1928 map shows some diminution in the size of the isolated tract of sand, but the channel is pushed close against the shore of Sand Island. Nineteen hundred and twenty-nine was the year of the big storms. The "North Band" went ashore on Peacock Spit in February, 1928, and lay there until February, 1929, when it was driven through the Spit by the fury of the storms, about where the cross cut channel is shown on the 1929 map. The ship channel is still close to the shore of Sand Island. Evidently a part of the surface of Peacock Spit was severely swept by these storms, and some

of it washed down below water. The 1930 map shows an east and west gash or channel across Peacock Spit, without any soundings. This would mean that the water was not deep enough to accommodate water craft, but that the soil beneath the water was not actually exposed at low water. It will be particularly observed that the charted channel is close to Sand Island. That part of Peacock Spit south and east of the transverse uncharted channel is partly above high water, and is the land in dispute in this case. The cross referred to above is now in the center of that part of Peacock Spit, and above high water. The 1931 map shows substantially the same situation as the preceding map, except that the transverse channel, still uncharted, has taken a somewhat northeasterly and southwesterly direction. The cross is about in the middle of that part of Peacock Spit south and west of the uncharted channel, and this area constitutes the premises in dispute. The charted channel is very close to Sand Island and the body of land constituting the premises in controversy, by a process of accretion, has built south and east toward Sand Island. Sand Island, in the meantime, has been, in fact, receding. The 1932 map shows the same relative positions. The premises in controversy are still separated from Sand Island by a channel. However, on this map neither the channel close to Sand Island nor that cutting across Pea-

cock Spit, is charted. The 1933 map shows several changes. The transverse channel, the one which cut Peacock Spit in two, is now charted. The area in controversy has at one point joined Sand Island and it is obvious that this was the result of the building up of accretions to this area, and not to Sand Island. There is still clear water and a channel between Sand Island and this body of land extending from the most westerly dike westerly for a distance of six or seven thousand feet. The 1934 map shows substantially the same condition.

In 1934, appellants carried on fishing operations on the land in controversy. The dock which they used was built under the lease from Washington on this land and projected north into the channel between it and Sand Island, and the boats used to carry away the fish reached this dock by a channel which went in between the easterly tip of the land and the most westerly dike, and thence along the channel between this land and Sand Island. We submit that these maps show conclusively that the premises in controversy are not an accretion of Sand Island.

We will now refer to some aerial photographs which supplement what is disclosed by the maps. It was impracticable to incorporate these maps in the printed transcript. The original and two duplicate sets will be made available to the court in the consideration of this case.

Defendants' Exhibit 15 (Tr., p. 286) was taken graph taken at 11:50 A. M. on July 10, 1928. To the upper left hand corner is the north jetty and the sands which have built up in its lee. To the right are Cape Disappointment and Peacock Spit, Sand Island, and, farther to the north, Baker Bay.

Defendants' Exhibit 15 (Tr., p. 266) was taken at 11:14 A. M. on April 19, 1930. In the foreground is the north jetty, and beyond is Cape Disappointment. Peacock Spit is shown extending southerly and easterly of Cape Disappointment, with the transverse channel across it, and beyond is Sand Island, with a clearly defined channel between it and Peacock Spit.

Defendants' Exhibit 16 (Tr., p. 286) was taken on May 4, 1931. It shows the north jetty, a part of the mouth of the Columbia River, Cape Disappointment, the transverse channel cut across Peacock Spit about where the "North Bend" went through, below that to the south and east the premises in controversy, and beyond that, Sand Island.

Defendants' Exhibit 17 (Tr., p. 287) was taken on the same day, about the same time as Exhibit 16. It apparently was taken from a point some distance out beyond the jetties. It shows the mouth of the river and both jetties. To the left, it shows Cape Disappointment, the transverse channel re-

ferred to, below that, the premises in controversy, Sand Isand, and the channel between Sand Island and the premises in controversy.

Defendants' Exhibit No. 18 (Tr., p. 288) was taken on the same day and about the same time as the preceding pictures. It is a close-up view of the tip of Cape Disappointment, the transverse channel which cut across Peacock Spit in 1929 and 1930, the premises in controversy below this channel, Sand Island, and the channel between it and the premises in controversy, and beyond, the Baker Bay area.

Defendants' Exhibit 19A, 19B, 19C and 19D (Tr. p. 289) is made up of four photographs joined together. Each photograph gives a close-up view of part, and the four together, give an excellent picture of the situation as it existed when the photographs were taken on October 1, 1933. To the right is that part of Sand Island north and west of the most westerly dike. In the lower right hand corner is shown the westerly dike which extends out from Sand Island, twelve hundred feet or more. Extending from this dike in a northwesterly direction is the channel which separates Sand Island from the premises in controversy. The white areas on Sand Island and on the body of land referred to as the premises in controversy, indicate land above high water, or what is called dry sands. It was during this year that the area in dispute and Sand Island

joined at one point by accretions to the former. The two bodies of land have joined for a distance of about 1000 feet, and there still remains a channel between them for a distance of over 6500 feet. The fishing operations, carried on in 1932, 1933 and 1934, were along the ocean side of the area in dispute. The buildings to house and otherwise accommodate the men and to shelter the horses used in these fishing operations, were constructed on this land. The dock used in the operations was built from this land northeasterly into the channel between this land and Sand Island. Up to and including the fishing operations of 1934, the boats reached the dock through the channel between this land and Sand Island.

On this composite picture, the dark area in the upper left hand part is Cape Disappointment. Projecting at right angles from Cape Disappointment, at the upper left hand corner, is the north jetty. The white, wavelike lines running from the upper left hand corner down towards the lower right hand corner, were made by the break of the waves or surf on shoals or the shoreline.

None of these photographs was taken at low tide. They were taken at from ten minutes to twenty-three minutes either before or after low tide (Tr., p. 308).

If more was needed to show conclusively that the premises in question are not an accretion to Sand Island, and that appellants engaged in no fishing operations on Sand Island in 1932, or subsequent years, it will be found in the testimony of all the witnesses who testified on the subject. The testimony of the witnesses will be briefly reviewed in the order in which it appears in the transcript. For the convenience of the court and with the hope that it will facilitate its labors, we have separated from a mass of evidence regarding winds and waves and conditions of many years ago, and set down on the following pages, the testimony directed to the issue involved.

Mr. Lewis, an engineer, was a witness for appellee. He testified at considerable length regarding conditions as they existed for about one hundred years prior to 1920. He presented a map or chart, showing the westerly and northerly movement of Sand Island for a number of years prior to 1920. However, he admitted on cross-examination, that this movement of Sand Island stopped about 1920, and from that time on by erosion and washing away Sand Island receded towards the east. In other words, it was receding from and not building toward Peacock Spit and the premises in controversy. He testified (Tr., p. 112):

> "Q. Well, is it, or is it not a fact, that beginning on maps immediately following the ones

you used, this so-called westerly movement ceased, and the west end of Sand Island washed away and receded towards the east?

A. Yes; that is correct.

Q. Why didn't you put that on the map?

A. Because it is apparent from — clearly apparent from the maps; because the movement is not so gradual as in those years, and is easily discernible by looking at those other maps."

Mr. Parker was a witness for the government. We quote the following from his testimony (Tr., pp. 137-138-139-140):

"The last time I fished in the lower waters of the Columbia was in 1929. At that time I fished in the Fall on Site No. 2 on Sand Island, with Mr. Smith. It was a drag seine operation. Mr. Smith was foreman of Mr. Barbey. (Explanation: This operation was carried on under a lease with the United States of Sites 1, 2, 3, 4 and 5, on Sand Island; Tr. 100). At that time I remember the Columbia River Packers' Association was carrying on drag seine fishing across on Peacock Spit to the west and a little to the north. The drag seine operations of the Columbia River Packers' Association at that time were over on the sands somewhat to the west of Site No. 2. * * *

"At that time, the Columbia River Packers' Association had structures, such as a dock, mess house, barns, etc., on these sands, to house the men and horses. Boats operated by Columbia River Packers' Association went to these fishing operations to carry the fish over to the packing house at Astoria. These struct-

ures, or particularly the dock, projected over these sands into the channel between these sands and Sand Island, and the boats coming from Astoria to carry supplies in and fish out went down the channel between Sand Island and these sands. The channel was rather close to the shore line of Sand Island in 1929. I was down there in 1930. * * *

"The fishing operations I saw in 1934 were carried on from down here to here, the length of the beach (indicating). That would be south of the lagoon, and the buildings used in connection with these fishing operations were where I have marked with a spot, and that was south of the lagoon. It was across the lagoon. You would have to look across the lagoon to the north and east to see the high water line on Sand Island. The structures used in these fishing operations projected out into the lagoon. There was a bunk house, a mess house, I should judge, and the dock projected out into the lagoon. The boats reached the dock through the channel between the sands upon which these structures stood and Sand Island, and came into the channel a little to the west of the most westerly dike and then proceeded up to the dock.

Q. And the dock was built into the land—the dock was built so that it projected eastward and northward into the water?

A. A little north.

Q. And the dock didn't reach what you call high water mark on Sand Island?

A. No.

Q. In other words, the boats came in that channel along the south shore of Sand Island and tied up to the dock?

A. Yes.

Q. And was plenty of water between that and Sand Island, proper, for the dock—the boats to tie up to the dock?

A. Yes.

Q. Load and go out through the same channel?

A. Yes.

"These boats were what is called fishing tenders, about sixty feet long, with a beam of about fifteen feet and draft, when loaded, of 7½. I was only down there once in 1934, and only observed these fishing operations for about an hour, which was in the month of August."

Lars Bjelland was a witness for the government. We quote the following from his testimony (Tr., p. 141):

"I observed drag seine operations in 1932 below the lower dike and in the general vicinity of the area circumscribed in red on the 1934 map. I can't say exacty how long these operations continued, but I should say from the latter part of June until August. I observed drag seine operations on the same premises in 1933, and again in 1934. The drag seine operations I have referred to were carried on in 1932, 1933 and 1934, upon the sands that I have indicated. * * *

(Tr., p. 141):

"I located some fishing operations on the sands south of Sand Island on the 1934 map. Assuming this map is drawn to its scale of about a thousand feet to a quarter of an inch, these sands are about 1500 feet south of the high water mark of Sand Island. The seines

were being dragged in or landed on the southerly or ocean side of these sands. The structures that were being used in connection with these operations were on the sands, and probably at least a thousand feet away from the white line marking the south point of Sand Island, of the high water mark, and these structures consisted of a mess house, bunkhouse, accommodations for horses, etc. The dock which served these operations was built out on these sands and projected **northward toward Sand Island.** The boats which came in there to serve these operations came into the channel between these sands and Sand Island.

"I spoke of some piling. This piling is considerable to the west of where the fishing operations were being carried on in 1934. The old piling may have been driven some years ago and was used in connection with securing their barges.

Q. Do you remember, as a matter of local history down there, that as these sands shoaled up and pushed towards Sand Island, that dock which was inshore between the sands and the Island, got sanded up?

A. Yes.

I don't remember how many docks were built, but I do remember there were two or three?"

Mr. Woodwoth was a witness for the government. We quote the following from his testimony (Tr., pp. 154, 155):

"I saw fishing operations in 1934, but do not know who were carrying them on except by hearsay. In connection with these fishing operations I saw on the sands where the fish-

ing operations were being carried on permanent structures such as buildings, docks, etc. I do not recall whether I saw them in 1933, as I came back to Point Adams Station in November or December of that year, but I did see them during the fishing season of 1934. I never was at the buildings. Probably was within a half or a quarter of a mile of them. I don't know how late in the season of 1934 these fishing operations continued after August 25th. They were drag seine operations, and the drag seines were being landed on the south shore of the sands. The structures were up further to the north on the high sands. These high sands where the structures were located would be about 2000 feet south of this white line on the 1934 map, that marks the high water line of Sand Island. I am not familiar with the dock which was used in connection with these fishing operations in 1934, and I do not know how the fish was handled after the nets were drawn in on the south shore of the sands. I know nothing about the fishing operations there in prior years."

Mr. Aho was a witness for the government. We quote the following from his testimony (Tr., pp. 158, 159):

"The last time I saw drag seine fishing on those sands lying south from Cape Disappointment and **west of the channel, was last year.** The operations were being carried on by the Coumbia River Packers' Association and Barbey. **I am now referring to the sands south of Sand Island.** * * *

"The sands south of Sand Island were fished during the year 1931. The fishing started in

June and ended the 25th of August. It was right from here down (indicating) that the fishing operations were being carried on in 1934 by Columbia River Packers' Association and Barbey. I refer to an area here on the sands south of Sand Island. I don't know the distance, but I know that they fished there; as far as the sand went down, they fished. This would comprise practically all of the edge of the sands west of the dike leading out into the ocean, and the southerly edge of the sands —the entire length there. I observed some fishing activities at these same locations in 1933 by the same parties and carried on about the same period; that is, from June until the 25th of August.

"I am familiar with the location of some piling on the sands south of Cape Disappointment and Sand Island. I am indicating on the 1934 map the point where these structures were used to receive fish. The point which I locate is a trifle to the west of the intersection of a cross on the 1934 map which is immediately south of the word 'Sand', and that cross, I think, is on every one of these maps. There were two different constructions, piling, driven in the sands. They extend above water at low tide and also high tide. The other structures on that body of sand lying south of Sand Island are piling driven into the sand where there had been seining houses, about midway; that is on the lagoon side; about midway from the west dike or jetty on a straight line to the mark I made before. These piling were put in to receive the fish when they were seining on the spit and are now in the same location as when they were first placed. * * *

(Tr., p. 161):

"My home is at Ilwaco, and I mostly use the North Ship Channel in going out to the Columbia River to lay out my nets; I mean by this, southerly and southwesterly of Sand Island. I have been using that channel for about 15 years. Sometimes we would not use it because it was too rough. I am not using the channel that the 'North Bend' cut through; I am using the channel right southwest of Sand Island, the old ship channel, they call it. It is not where the 'North Bend' came through; the 'North Bend' came through about one-half or one mile away. * * *

(Tr., p. 162):

"The drag seine operations that I referred to in 1933 and 1934 were carried on west of the westerly dike. The sands didn't reach out beyond the most southerly extremity of the dikes, but the seines did. The seines were landed on sands that were directly west of and below the dike. * * *

"The mess houses were along here (indicating). These structures were all southerly of the white line on the map which has been said marks the southern boundary of Sand Island. The mess house and structures and dock were all considerably south of that white line and south of the lagoon. The boats which brought in the supplies and carried out fish, reached the dock from below the western dike.

"They couldn't get in with big boats; it was too shallow, and they put a skiff and small boats in that low water. In 1934, they had a small cut or channel in there that they

went in as far as the pilings and they had a scow and they would haul out with the scow and the launch would pull them away. They approached the dock on water which was between the sands and this white line of the Sand Island in 1934. * * *

(Tr., p. 166):

"The fishing operations that were conducted in 1932 were on the same sands as in 1934."

Mr. Glasgow, an engineer, was a witness for the government. We quote the following from his testimony (Tr., p. 171):

"The 1932 map shows a body of sand that lies on the river side of Sand Island and is cut off from Sand Island by a channel, and it is also cut off by another channel into Baker's Bay. From the east end of that detached body of sand are nine or ten soundings, to a point opposite the west end of it. * * *

(Tr., p. 180):

"The 1923 map, which is the first one I made, shows the channel between Sand Island and Peacock Spit, in substantially the same location as on the 1922 map, except that it has moved a little to the eastward, and this sand between high and low water on Sand Island is narrower; shows the channel encroaching on Sand Island and Peacock Spit has built a little further eastward in two years, moving towards Sand Island. On the next map, Peacock Spit, above low water, is about the same as on the preceding maps. The channel between Peacock

Spit and Sand Island is substantially the same, except it is still moving a little eastward towards Sand Island, with a recession on the part of Sand Island, with a depth of water up to 25 feet. The next map shows the channel substantially the same as on the preceding maps. It shows a little projection on Sand Island, which has the effect of an erosion; Sand Island is eroding off on the Peacock Spit side, and Peacock Spit is building out towards Sand Island. * * *

(Tr., p. 184):

"The 1930 map shows the channel next to Sand Island with a small channel branching from it and the new channel farther north and cutting across Peacock Spit. The channel next to Sand Island was sounded, but not the one across Peacock Spit. Peacock Spit was flattened out and enlarged on this map, but covers the same area towards Sand Island. Sand Island is shown on this map as still receding towards the east. To my knowledge, it has been doing this all the time I have been there. During this entire period, Sand Island has been eroding, and Oregon Sands, or Peacock Spit, have been following it up. I never knew the sands as 'Oregon Sands', but I understand what is meant by the question. * * *

(Tr., p. 185):

"The channel next to Sand Island was the only navigable channel at that time, and for that reason, it shows soundings, and the channel through Peacock Spit was not sounded as it was not deep enough for navigation, except in emergency. The sands extending out from Peacock Spit are still growing eastward, south

of Sand Island, and parallel to it, and in the 1932 map, it is not only growing against the west shore of Sand Island, but along the south shore and that is the body of sands I have previously mentioned as being a part of Peacock Spit."

Mr. Rogers was a witness for the government. We quote the following from his testimony:

(Tr., p. 191):

"I did not observe any seining operations on these premises in 1932 or '33. I was not down in that vicinity in those years while seining was being conducted, and I don't recall that I was down there in '30 or '31. I probably was, but I have no recollection. * * *

(Tr., p. 195):

"The next operation that I recall was in 1934, which extended westerly from the most westerly dike down across the sands which are marked here in red, to a point on the map where there is a figure '6'. In other words, covering these sands (indicating), covering the area which would be westerly from the most westerly dike. * * *

(Tr., p. 197):

"That is to say, the operations I saw prior to 1934 were along the shore of Sand Island easterly of the point where the most westerly dike is now located, and the fishing operations I saw in 1934 were westerly of the most westerly dike. At the time the fishing operations were being carried on on Sand Island, between 1925 and 1930, I knew that Columbia River Packers' Association was carrying on fishing

operations on Peacock Spit.

Q. Mr. Barbey was carrying on fishing operations on Sand Island easterly of where the dike is now located, and the Columbia River Packers' Association was carrying on the same type of operations, drag seine operation, on Peacock Spit?

A. That is correct.

"I never had a lease on any part of Sand Island, and I never saw a lease on any part of Sand Island that was executed."

Mr. Cherry was a witness for appellants. He represents Lloyds, the San Francisco Board of Underwriters, is president of the Port of Astoria, and of the Arrow Dock and Barge Company (Tr., p. 218). It was his company that salvaged the "North Bend". He said this ship was a four-masted sailing vessel, tonnage length of about 204 feet, 40-foot beam, and a hold depth of about 14 feet. It went ashore in February, 1928, on the ocean side of Peacock Spit, and about a year later, worked her way through the spit into the channel between Sand Island and Peacock Spit. He saw the movement, was on the ship from time to time, and kept a log book. The movement started on January 28, and ended on February 9, 1929. The point where the vessel went ashore in 1928 is shown on the 1928 map, where the words "North Bend" appear on the ocean side of Peacock Spit. She dropped into the channel between Peacock Spit and Sand Island about opposite where she went

aground. When she dropped into the channel after the movement through the spit, she was full of water and drawing about 20 feet. She was then towed to Fort Canby, a short distance north, and beached and pumped out. A couple of days later she was towed to Astoria, and the route followed was the channel close to Sand Island and inside the Peacock Spit sands. We quote the following from the testimony of Mr. Cherry (Tr., p. 220):

> "We followed the channel that is charted on the 1929 map adjacent to Sand Island. There was no other channel which we could follow from Fort Canby to Astoria at that time. The vessel had a length over all of about 225 feet. When she was towed to Astoria in February, 1929, she was drawing about 14 feet of water, and there was sufficient water in the channel to accommodate her. At the time the towing was done there was a ground swell that would increase the depth of the draft of the vessel maybe three feet, because of the rise and fall of the swells.
>
> "I would not exactly say there was a channel left where the vessel worked its way across Peacock Spit. There was a place where she went through, but you would hardly call it a channel; it was a sort of a gash in the sand.
> * * *

(Tr., pp. 221-222):

> "Q. Just what did that storm do to Peacock Spit, do you know?
>
> A. Well, it drove the 'North Bend' through and made a kind of gash there. That is about all I noticed.

"I didn't notice particularly what effect the action of the waves and storm had on the other sands of Peacock Spit. Every storm changes a little bit, but not materially. As a rule, heavy storms make some changes, but I don't think one storm would change anything. After this heavy storm the only change I noticed was that the ship had gone through the spit and there was a kind of a gash through the spit.

Q. Now describe that gash through the spit to the court.

A. Well, at high tide, the sea, when a heavy sea would pile up on the outside and kind of hurdle over and come through on the inside, but at low tide I say just like a gash in the sand; something like these things you got here, like one of these, like this one here."

Mr. McLean was a witness for appellants. He is an engineer, and from 1911 to 1914 was in charge of construction for the Federal government of the north jetty. This work included a study of the whole mouth of the river, surveys of Sand Island, Baker's Bay, etc. He left the government to take charge of reclamation work in Astoria, including the construction of bulkheads on the waterfront. Except for his period of service in the army, he has been engaged in engineering work in the Lower Columbia since 1910. He made a survey of the tide lands leased by the State of Oregon to Columbia Fishing Company in 1928. The survey was made on the ground, and he surveyed and

platted the land to low water (Tr., pp. 223, 224, 225). This lease is in evidence (Deft.'s Ex. 20), and a summary appears on page 293 of the transcript. The area then surveyed was 52.39 acres. Its metes and bounds description were given by the witness (Tr., pp. 201, 202). It is the same land that the State Land Board was proposing to advertise for leasing at the time this suit was tried (Tr., pp. 209, 210). What was done under the Oregon 1928 lease was described by a witness for the government (Tr., pp. 204, 205). The land surveyed by Mr. McLean and then leased by the State of Oregon may be located by reference to the 1934 map. It is the area enclosed in a continuous heavy red line south of Sand Island and is a part of the premises in dispute in this case (Tr., p. 201). Mr. McLean demonstrated by measurements that the west and south shore of Sand Island in the vicinity of the premises in dispute had not grown or built up by accretion after 1920, but that, on the contrary, there had been a substantial recession of the island as the result of erosion. This is in accord with the testimony of Mr. Lewis, an engineer, and Mr. Glasgow, an engineer, supra, both witnesses for the government (Tr., pp. 226, 227, 228). He said (Tr., p. 230):

> "The closest point of the sands surveyed by me in 1928 to the shore line of Sand Island, that is to the high water line of Sand Island, as shown on the 1934 map, is about 850 feet

and in a southwesterly direction from Sand Island."

He pointed out that the 1926 map shows a body of sand at about the location where he made his survey in 1928, and (Tr., p. 233):

> "The 1927 map shows that Peacock Spit maintained its same general outline except that a part of it has appeared again above high tide line. This map also shows a body of sands at the location of my survey in 1928, and there also appears above low water some sands between the area surveyed by me in 1928 and Peacock Spit. The 1928 map, compiled from surveys completed in May of that year, shows that some of these sands go below low water mark, but that there is an area above low water mark at the location of the 1928 survey. The channel between these sands and Sand Island then ranged from 12 to 17 feet."

He said that in 1929 there were some heavy storms, that there was some breaking up, and the "North Bend" was driven through the spit; that the 1929 map shows a body of sand above low water at the location of the 1928 survey, and also shows that about 20% of Peacock Spit was above high water, and (Tr., pp. 234, 235):

> "The map of 1930 shows a cutoff gap or gash through the spit where the 'North Bend' went through. That is uncharted; that is, there are no soundings. This map shows sands above low water in the location surveyed by me in 1928. The navigable channel is east of these

sands, between them and Sand Island. There is a channel with no soundings in it between these sands and Peacock Spit; that is, there is some open water there. Peacock Spit is consolidated again and is growing together with these sands I surveyed in 1928; both of them are growing larger.

"Turning to the 1931 map, we note this cutoff gap or channel about where the 'North Bend' went through, which is still uncharted, and that part of Peacock Spit south of this cutoff channel has combined with the area surveyed by me in 1928, and the charted ship channel is between these sands, including Peacock Spit, and Sand Island. The whole body of land westerly of this channel, is designated on the map as Peacock Spit, and according to this map, was all above low water.

"Turning to the map of 1932, it appears that these combined sands maintained substantially the same contour excepting that the entire body has moved easterly. The actual area is about the same, but there has been some erosion or washing off on the west and south, and they have grown or extended towards the east.

"Turning to the map of 1933, it will be seen that south of this cutoff channel, above referred to, there is a solid, continuous body of sand which, since the preparation of the 1932 map, has formed a juncture on the north end with Sand Island.

"The 1934 map shows the same general body of sand, very similar in area, except that it has moved slightly to the north and somewhat to the east.

"In 1933 there was still a channel between Sand Island and these sands, with an approach

> from the easterly end of the sands. The 1934 map, which is dated June, July and August of 1934, still shows a small gap along the side of the lower dike leading into the water immediately south of Sand Island. * * *"

He pointed out that in 1932, for the first time since 1926, as shown by government maps, the channel between Sand Island and the sands in question, was not charted. It also appears that the channel cutting across Peacock Spit to the north is not charted on the 1932 map, and (Tr., p. 235):

> "In 1929 there were soundings shown in the so-called cutoff channel, with a controlling depth of four feet. In 1930, it was not charted, nor was it charted in 1931 or 1932. It was charted in 1933, with a controlling depth of five feet; that is, five feet was the shallowest point. In 1934, it was charted with a controlling depth of six feet, and on this 1935 map, or tracing (Exhibit 5), it is not charted; that is, it has no soundings except one or two."

With reference to the land surveyed by him in 1929, and leased by the State of Oregon, he testified (Tr., pp. 246, 247):

> "Referring to the description in Exhibit 9 and to the area circumscribed by red lines south of Sand Island on the 1934 map, that area does not include any accretions, but only includes the metes and bounds description of the area as surveyed and platted by me in 1928. Of course the red lines surrounding the area do not give the metes and bounds. The

metes and bounds description appears in Exhibit 9. The red lines merely mark the exterior boundaries of the area as surveyed in 1928, and do not, of course, take into account accretions. * * *

"The area in red does not purport to show what land, if any, is above high water. It shows the land above low water."

Exhibit 9 referred to by the witness is found on page 210 of the transcript, and Exhibit 8, which is his 1928 survey note, appears on page 202 of the transcript.

Mr. Brown, a witness for appellants, is an engineer, and for many years was employed by the government on the Columbia River. Since leaving the service of the government, he has followed his profession, his work being mostly on the Columbia River (Tr., pp. 247, et seq.). His testimony corroborates that given by Mr. McLean, and witnesses for the government, with reference to the recession of Sand Island and the building up of the sands which are designated on the government map as Peacock Spit, which include the lands in controversy, towards Sand Island, resulting in a juncture at one point with Sand Island in 1933, as the result of the building up of, or accretions to, the sands, and not to Sand Island.

Mr. Pice, a witness for appellants, was employed by the Columbia River Packers' Association in 1928, 1929 and 1930, and afterwards by the

same company and Mr. Barbey as foreman in charge of the seining operations on the south side of Peacock Spit. These seining operations were on the southwesterly side of the sands known as Peacock Spit (Tr., pp. 263, 264); and (Tr., p. 265):

"The drag seines were laid out in the waters on the ocean side. There were buildings on the spit close to the seining operations, consisting of a fish dock, mess house and barn, and other structures, in 1928. These buildings were about here (indicating) with reference to the fishing operations. They were located about the center of the sands. The dock extended from the sands into the channel between Peacock Spit and the Island. It was used for unloading supplies brought to the fishing operations and loading fish to be carried away.

"In 1929 drag seine operations were carried on by Columbia River Packers' Association on Peacock Spit, about where they were in 1928. The seines were laid out in the waters on the ocean side of the spit and we had buildings on the sands used in connection with the fishing operations.

"In 1930 I had charge of the drag seine operations on the spit. These operations were carried on about here (indicating on map of 1930) and—

"Q. You have located a point approximately where there is an area marked out by a heavy white line?

A. Yes, sir.

Q. In the area marked 'Peacock Spit'?

A. Yes, sir."

During these years the boats running between Astoria and Baker's Bay used the channel between Sand Island and the area designated as Peacock Spit, running very close to Sand Island, and (Tr., pp. 266, 267):

> "In 1931 I had charge of the drag seine operations which were carried on from the easterly end of the spit and running westerly along the spit. The seines were laid out in the waters and landed on the ocean side of the spit. There was a dock used in connection with the fishing operations which, as nearly as I can remember, was located a little south of the figures '5' and '6' (in the channel between the sands and Sand Island). It was a dock which rested on piling and extended from Peacock Spit or the sands we have been talking about, north into the channel between Peacock Spit and Sand Island. The dock was used to land supplies for the fishing operations and to carry away fish. The boats that came to the docks were what were called the fish carriers — about 60 feet long and about 14 feet beam, and were driven by gasoline engines. They have a draft of about eight or ten feet. These boats approached the dock through the channel between Sand Island and the sands upon which we are fishing. As a rule, the boats came from Astoria and when loaded, went back to Astoria. Some boats, of course, went through to Ilwaco, on Baker's Bay. All the boats which came to our dock, or went through from Astoria to Ilwaco used the channel which was between Sand Island and the sands upon which we were carrying on the fishing operations.
>
> "I had charge of the drag seine operations in 1932, and —

"Q. And where were they with reference to the drag seine operations of 1931?

A. A little higher up, easterly, more easterly.

Q. A little higher up, but more easterly?

A. Yes.

Q. On the same general body of sands?

A. Yes, the same body of sands.

* * * *

(Tr., pp. 267-268-269):

"I had charge of the drag seine operations in 1933, and—

"Q. And where were they carried on with reference to the operations of '32?

A. Right in here (indicating), east end of —you see, we worked up every year more. The sands kept working easterly a little more.

Q. That is, the sands kept working easterly?

A. Yes, sir; somewhere about there (indicating).

Q. Building up easterly?

A. Yes, sir.

Q. But did you work along these same sands?

A. Yes; same sands.

Q. And I presume, as usual, you laid your seines out on the ocean side?

A. Yes.

"The fish was gathered in scows the same as in 1932 and were tied up to the same piling

as in 1932, which they reached through the same channel, as in 1932, between Sand Island and the sands upon which the fishing operations were being carried on.

"I had charge of the drag seine operations in 1934, which were carried on in about the same place as in 1932, perhaps a little farther easterly. In the meantime, a dock had been constructed on these sands, on the north side of these sands or spit, which would be on the south side of the channel between these sands and Sand Island. The dock extended from the sands or spit north into the channel in the direction of Sand Island. It was built on piling and used for the loading and unloading of boats. The boats that came to this dock in 1934 were small, about 32 feet long. They came into the channel at a point near the most westerly dike which extends out from the south shore of Sand Island usually on half tide, and then reached the dock through a channel which existed between Sand Island and the spit, or sands upon which we were fishing. When the boats were loaded they went back out through the same channel and also towed the barges or scows out. The fishing operations in 1934 started about June 11 and were carried on until about August 25th. There were no drag seine operations during the fall seasons. It is customary to close down drag seine operations on August 25th of each year. In the spring we usually began somewhere around June 1st to the 10th, depending on the season.

"When the fish were landed on these sands in the drag seines, on the ocean side, they were hauled across the sands to the dock where they were loaded. An ordinary type of four-wheel

wagon drawn by one team of horses, was used in the hauling. * * *

"The fish were hauled in a wagon across the sands to the dock after being landed on the ocean side of the beach. The distance in some years would be 500 feet and some years a little more, and some years less. In 1934 we had about 84 men on the fishing operations, referred to, and about 32 head of horses. * * *

(Tr., pp. 270, 271, 272):

"In 1928 Barbey Packing Company was fishing on Sand Island. Mr. Barbey had a separate operation on Sand Island. I can't say how far the Barbey Fishing operation on Sand Island was from the operation of the Columbia River Packers' Association, of which I was foreman. I hardly think it was as much as two miles, but I never measured it, and it is hard to judge distances.

"In 1929 Barbey was carrying on an independent operation on Sand Island. I know where the westerly dike is located. I wouldn't say whether the fishing operations carried on by Barbey, to which I have referred, were westerly of where the westerly dike was later constructed. Barbey had two locations there, Sites No. 2 and 3 on Sand Island. They are the ones noted as Sites 2 and 3 in plaintiff's Exhibit No. 3. The location of the Barbey operation was on Sand Island. It probably extended easterly and onto Site 4. I am not able to say whether the 1929 Barbey operation was about a mile and a half from the operation with which I was connected, because I never measured the distance.

"In 1930 I was working for the Columbia River Packers' Association on Peacock Spit

and the fishing operations began about the easterly end of what is designated on the map as Peacock Spit, and extended westerly along the south shore. It might have been a distance of a couple of thousand feet—some years it was shorter and some years longer. I think Barbey was fishing on Sand Island in 1931. I am not sure. I think there was only one operation in 1931. * * *

"In 1932, the drag seine operations began to go farther to the east and by 1933 and 1934 we were fishing westerly from the last dike which had been constructed there. * * *

"In 1934, we went into the channel between Sand Island and the sands upon which we were fishing at about half tide, because the channel was shoaling up a bit.

"The sands of which I am speaking south of Sand Island would not be flooded with water during high tide in the summer time. I should say about half would be flooded at high tide. We are not troubled in the summer with swells and very high tides. There would be no tides in the summer that would cover these sands. There were no tides in 1934 that covered the sands, because we had buildings on there. I was on these sands until August 25th, 1934. I have not been on them this year. * * *

"During the fishing season of 1934 we kept the men and horses in the buildings on the sands.

"Q. You had buildings on the sand, and the horses were kept there?

A. Yes, a cook house and a barn.

Q. And the men were kept there, except when they went ashore Saturday night?

A. Yes."

Mr. Goulter, a witness for appellants, lives at Ilwaco and furnished horses used in the seining operations, and (Tr., pp. 273, 274):

"I furnished horses in connection with their seining operations. I furnished horses in 1928 for the Columbia River Packers' Association, probably about 80 head, for use in drag seine operations. The first time I furnished any horses to Mr. Barbey was either in 1930 or 1931.

"In 1928 I furnished horses for seining purposes to Columbia River Packers' Association on the sands that were referred to by Mr. Pice. I furnished 32 horses for this operation. They were taken over to the fishing grounds in a scow. The scow went through the channel between the spit and Sand Island. I was at these fishing operations during the summer of 1928, during all of the time my horses were there. I refer to the drag seine operations of which Mr. Pice testified. The horses were kept in a barn on the sands. There was a dock. It was built on the spit extending out into the channel between the spit and Sand Island.

"I furnished horses also in 1929. I also furnished about 32 horses to be used in the drag seine operation referred to by Mr. Pice. The operations began sometime in June and ended August 25th. The horses were kept on the sands in a barn. There was a dock used in connection with the operations, which extended northerly into the channel between the spit and Sand Island. Fish carriers and other boats came to that dock through that channel. There was also located on the sands upon which the

fishing operations were being carried on, other buildings such as a cook house, bunk house, etc. The fish were landed in nets on the ocean side of the spit, and carried across in wagons to the dock.

"I furnished about the same number of horses during the same period for the operations in 1930. The horses were kept on the sands in the same way as in preceding years and there was a dock used in connection with the operations which extended from the spit northerly into the channel between the spit and Sand Island and this dock was approached by several boats which carried supplies to, and fish away, and these boats used the channel between the spit and Sand Island. * * *

(Tr., pp. 274-275):

"I furnished horses in 1933 for the fishing operations of which Mr. Pice spoke. This year the horses were kept on the sands on Peacock Spit. They had some scows that took them over.

"In 1934 I also furnished horses for the seining operations of which Mr. Pice spoke. This year the horses were kept during the operation in a barn on Peacock Spit. The barn was on the north side of the sands and they fished a little to the west and south. The fish, when taken in the nets on the ocean side of the sands, were carried this year, as in previous years, in wagons across the sands to the dock built from the sands north into the channel between the sands and Sand Island. Supplies reached the fishing operations by way of this dock. The channel I refer to is the one between Peacock Spit and Sand Island. Fishing operations in 1934 closed on August 25th.

(Tr., pp. 275, 276, 277):

"When I furnished horses to Columbia River Packers' Association in 1928, it was fishing Peacock Spit. I am not furnishing horses to Mr. Barbey for fishing operations on Sand Island at that time. I am not able to say how far the operation of Columbia River Packers' Association on Peacock Spit was from the operation of Barbey on Sand Island. I never measured the distance. I could see the men working on Barbey operation. I am not able to say whether these two operations were as much as two miles apart. I should say maybe between one and one-half and two miles in 1928. Of course, the distance varies. In 1929 Mr. Barbey was fishing the sites on Sand Island and the Columbia River Packers' Association was fishing on Peacock Spit at the location that I have already described.

"I began leasing horses to the Columbia River Packers' Association and Barbey, combined, either in 1930 or in 1931; I am unable to say which, but I was still furnishing horses for the operation on the spit as I had before.

"Q. (by Mr. Hicks): In 1931 and '32, when you were furnishing horses for the companies combined, they were fishing the identical premises and the identical locations at that time that Mr. Barbey was fishing in 1928, while the Columbia River Packers' Association were fishing away over on Peacock Spit; is that right?

A. No.

Q. Well, now you just explain the difference.

A. Why, I don't think there were any oper-

ations carried on on Sand Island after '31. That is my recollection of them.

* * * *

"In 1928 the Columbia River Packers' Association were fishing off Peacock Spit and Barbey was fishing off Sand Island.

"Q. (by Mr. Hicks): Well, you testified that the operation in 1928 of the Columbia River Packers' Association was about between one and two miles from where Mr. Barbey was fishing at the same time.

A. That is—what? One and two miles from where?

Q. Between one and two miles, the way you put it, between the point where Mr. Barbey was fishing in '28 and where the Columbia River Packers' Association was fishing during the same year.

A. They were fishing on Sand Island and we were fishing on Peacock Spit, laying down in front of Sand Island.

* * * *

"Q. (by Mr. Hicks): Well, maybe I can make it more clear to you. I will ask you again if the premises that were fished by the combined companies in 1931 and '32 and '33—I ask you if those premises were not the identical premises, as to the location on this map, that were fished by the Barbey Packing Company in 1928?

A. No; not the way I see it.

Q. Well, can't you look at the map there and point out any difference in the location?

A. Well, no; in 1928 the Barbey Packing Company was fishing Sand Island, land on

Sand Island, and we were fishing on Peacock Spit."

Mr. Hansen, a witness for appellants, has carried on fishing operations in the Lower Columbia for many years (Tr., p. 277); and (Tr., pp. 279, 280, 281):

"I know where the fishing operations of the Columbia River Packers' Association and Mr. Barbey were carried on in 1934. I was at those operations once during July or the latter part of August. I reached the operation at that time in this manner: I took my gasoline boat and went over to the north side of Sand Island and tied up to a dock there and walked across the Island and then I had Mr. Goulter come across in a dinghy, or small rowboat, to Sand Island, and take me over to the spit where the fishing operations were being carried on. I landed on the spit close to the bunk house. I was there two or three hours. I noticed a body of water between Sand Island and the sands upon which these fishing operations were being carried on. At that time we called it a lake, or lagoon. This lake, or lagoon, is a part of the old channel which was between Sand Island and Peacock Spit, or the sands upon which the fishing operations were then being carried on. * * *

"When I made the trip in 1934 to the Barbey and Columbia River Packers' Association fishing operations, I went across from Sand Island to the sands upon which they were fishing in a small boat across a channel. I said it was about something like 60 feet wide. I couldn't say. The tide was out, and it was low water at the time. It was in the afternoon, prob-

ably 2:00 or 3:00 o'clock in the afternoon. It could have been as late as 4:00 o'clock. I made no memo at the time. It was pretty good seining tide and I was figuring on I might get some fish. But I wouldn't say just what time it was in the afternoon. The crew had just had their lunch, but that is hard to go by, as on the seining grounds they have lunch most any time of the day. It wasn't a low going out tide; it was a hold up tide at the time. I came in just about at low water. There was a small scow in there at the time. I did not see any salmon taken out of there that year, because I was only there once and at that time they were just going out fishing. When I came back from the seining grounds, I had to again go across the channel of the lagoon to Sand Island and I got a man to put me across. There was a net rack, there must have been a dock, and they were all on pilings. I wouldn't say as to the kind of buildings or whether there were any, because I don't recall. There was some kind of a floor construction on top of the piling. I was back there last week and saw some piling, but did not see any dock."

Mr. Suomela, a witness for appellants, has been local agent at Ilwaco for Columbia River Packers' Association since 1928. His duties took him frequently to where the drag seine operations referred to by preceding witnesses were carried on up to and including the year 1934, and (Tr., p. 282):

"I recall where the channel was with reference to these fishing operations. It was on the northerly side of the sands or what we call Peacock Spit, and between Peacock Spit and Sand Island. In my various trips down to the fish-

ing operations I saw boats passing through the channel. The type of boat that they used to carry the fish away from these operations was a fairly good-size cannery tender. It might have been between 50 and 60 feet in length. These boats would approach the dock through the channel between Sand Island and the sands to the south and west referred to as Peacock Spit, and on which the fishing operations were being carried on. * * *

(Tr., p. 283):

"The sands that I have been referring to as Peacock Spit are those south of Sand Island. I have always heard them called and known as Peacock Spit, and the channel I refer to is the channel between these sands that I have called Peacock Spit and Sand Island. It was used in 1932 and again in 1933. I observed that in 1933 there had been a juncture to the north of these sands with Sand Island and at this point to the north, the channel between these sands and Sand Island was closed up. However, south of this juncture there still remained the channel through which boats reached the dock on the sands and carried out fish. This channel led eastward or southeastward between the sands and Sand Island, to a point about at the westerly dike.

"The same condition prevailed in 1934 * * *

(Tr., pp. 284, 285):

"I am telling the court that the sands lying westerly of the dike and southerly of Sand Island were known to me through the years from 1930 on as Peacock Spit. I have never heard anybody call them Sand Island. I have heard that there were drag seine operations on Sand Island in 1930, 1931 and 1932. I did not

> hear of any drag seine operations on Sand Island in 1933 and 1934. The drag seine operations on Sand Island in 1931 and 1932 were not on the area designated as Peacock Spit, but were further east of them. Up in this territory (indicating) I know that there have been no drag seine operations in this territory that I have indicated on Sand Island since the dike was put in."

The dike referred to was in fact conpleted in 1932 and there were in fact, no fishing operations on Sand Island in 1932 or subsequent years.

In the light of the authorities and of the evidence just discussed, may we not ask: When does appellee claim that the premises in controversy became an accretion to Sand Island? Was it in 1923 or 1924, when, as shown by the government's maps for these years, Peacock Spit, embracing at that time, substantially all of the area in controversy, was separated from Sand Island by the only ship channel into Baker's Bay with a depth at low water ranging from 9 to 22 feet? Or in 1925, when the same conditions prevailed? Or was it in 1926, when the channel remained in the same position? Or was it in 1927, when the channel remained between Peacock Spit and also a new formation somewhat farther east and afterwards consolidated with Peacock Spit? The same condition prevailed in 1928, and also in 1929, at which time the cross cut channel appeared about where the "North Bend" went through.

On the map of 1930, the area in controversy, which is all that south and east of the cross cut channel, cutting Peacock Spit in two parts, was still separated from Sand Island by the only charted channel into Baker's Bay. Did it become an accretion to Sand Island that year? The same condition continued in 1931.

Certainly it cannot be claimed that the premises in controversy were an accretion to Sand Island up to that time. They constituted a large compact body of land, all above low water, and some above high water, separated from Sand Island by the ship channel still exclusivey used, and separated from the balance of Peacock Spit by the new uncharted channel. All this is also made clear by the maps and photographs referred to.

Again in 1932 this same body of land was separated from Sand Island by a channel. True, it was not charted that year, neither was the cut-off channel, but it was used by the boats which carried supplies to and fish from the operations, and by boats plying between Astoria and Baker's Bay points. It surely cannot be contended that it was an accretion to Sand Island at that time. The map of 1933 still shows a channel between these premises and Sand Island for a distance of about 7000 feet westerly from the most westerly dike and that these lands had joined Sand Island through

their own growth. Can it be claimed that when this juncture was made, this whole body of land became an accretion to Sand Island by slow, imperceptible deposit of particles of earth taken from one point and deposited in another, which is the test to be applied?

The composite photograph (Deft.'s Ex. 19A, 19B, 19C and 19D) shows the condition that existed in the fall of 1933. In 1934, there still existed a channel between Sand Island and these premises extending westerly about 7000 feet from the most westerly dike and this channel continued to be used by boats serving the fishing operations of appellants in 1934.

We submit that there is no basis for the claim of appellee that the premises in controversy, under the law of accretions, became a part of Sand Island at any time. They still belong either to the State of Oregon or the State of Washington, and the dividing line separating the property of appellee from that of the one state or the other, is the point at which the two bodies of land came together.

The evidence wholly fails to sustain the finding and decree that appellants were threatening, and intended, unless restrained, etc., to go upon, or use, the premises in dispute, or any other property claimed by appellee.

ARGUMENT

It is undisputed that appellants ceased fishing operations on, or in the vicinity of the premises in controversy, August 25, 1934. They were not resumed. There was no effort made to resume them, and there was no intention that they should be resumed, in 1935. Because of Initiative Law No. 77, passed in Washington in November, 1934, appellants could not procure any drag seine licenses in that state. It had no lease from Oregon and could not procure any lease unless Oregon advertised some property for lease, and appellants became the highest bidders. In other words, appellants could not carry on any fishing operations under the lease from Washington, or on premises to which Washington made claim—and it makes claim to all the premises in controversy—unless the Initiative Law No. 77, referred to, is repealed. It could not carry on fishing operations on any part of the disputed premises claimed by Oregon without getting a lease for the land and a fishing license from Oregon.

We submit that there is no evidence to sustain the finding and decree that appellants were trespassing or threatening and intending to trespass, upon the premises in controversy, or any other property belonging to appellee, or to which it made claim.

We respectfuly submit that the decree appealed from should be reversed.

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No. 8055

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COLUMBIA RIVER PACKERS ASSOCIATION, a corporation; BAKER'S BAY FISH COMPANY, a corporation, and H. J. BARBEY,

Appellants

vs

UNITED STATES OF AMERICA

Appellee

Upon Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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FOREWORD

The record in the case consists of the Printed Transcript of the record, the original transcript of the record prepared by the court reporter, which, by stipulation of counsel and order of the court, may be

referred to in the briefs and in the arguments, the original exhibits received in evidence which could not conveniently be included as parts of the printed record, and the printed transcripts of record filed in the names of the State of Oregon and the State of Washington, companion appeals herein, and which, by stipulation of counsel and order of the court, may be referred to in the briefs and in the arguments.

STATEMENT OF FACTS

This is an appeal from a decision of the United States District Court for the District of Oregon. The suit was brought in equity by the United States to obtain injunctive relief against acts of trespass and encroachment upon real property allegedly belonging to the United States, and as an incident to such relief to obtain a declaration of title.

The defendant, Columbia River Packers Association, is an Oregon corporation, and the Baker's Bay Fish Company is a corporation of the State of Washington. The two corporate defendants and the defendant, H. J. Barbey, are salmon packers and at all times herein material were engaged in the business of fishing for salmon and owning and operating salmon canneries. The three defendants were jointly engaged in the ventures out of which the controversy arose.

At p. 58 of the transcript of record will be found a map and chart of Sand Island, and circumscribed in yellow thereon is defined the area of land on which

it is alleged the trespasses occurred. The trespasses were denied, and issue was joined thereunder.

The original complaint was filed on the 15th day of August, 1934 (Tr. p. 306). Both of the local district judges felt that they were disqualified to sit in the case, and after much delay and difficulty in obtaining the services of a district judge, the Honorable C. C. Cavanah, United States District Judge for the District of Idaho, finally came to Portland and opened the trial on June 11, 1935. Decree was entered in favor of the United States on the 9th day of August, 1935, and in an eleven-page written opinion Judge Cavanah met and disposed of the points and issues raised in the case (Tr. p. 32 to 46 inc.). Appeal is instituted from this decree.

THE PLEADINGS SUMMARIZED

The complaint alleges that Sand Island is a military reservation of plaintiff, and that plaintiff is entitled to the immediate and exclusive possession thereof. The answer admits ownership by plaintiff of Sand Island, but avers that the area of sands to the south of high water mark of said Island, being the area circumscribed in yellow, is not a part of Sand Island, but rather a part of Peacock Spit and the property of the State of Washington.

The complaint next alleged that Sand Island is situate easterly and northerly of the north ship channel of the Columbia River. This allegation is denied, in

that it is claimed that the north ship channel, as a channel, has ceased to exist and that the said north ship channel which as a definitive line admittedly marks the boundry line between the States of Oregon and Washington, is situate where said Sand Island formed a union with the said bodies in the years 1932, 1933 and 1934.

It is next alleged in the bill that the sands situate on the southerly shores of Sand Island are immensely valuable as fishing and seining sites and this allegation is admitted in the answer. (Tr. 6, 16.)

It is next alleged in the bill, and admitted in the answer, that on the 27th day of May, 1930, the Secretary of War, acting for and on behalf of the United States, leased to the defendants herein, H. J. Barbey and Columbia River Packers Association, for a period of five years from and after June 1, 1930 "*the land on the south side of Sand Island,*" which lease, with its description and incidents, is set out in the case of Strandholm vs. Barbey, 145 Ore. 705; 26 Pac. (2) at p. 48, which said case was by reference incorporated in the bill and made a part thereof. (Tr. 8, 17.)

It is then alleged in the bill that the defendants occupied Sand Island under the terms of said lease for two successive seasons, to-wit: for the years 1930 and 1931, and thereupon secured cancellation of said lease and abandoned the premises; that beginning in 1932 and continuing on through the years 1933 and 1934, the defendants continued to use the identical properties

heretofore described, without payment of rentals, and that preparations for the fishing of said premises for the season 1935 had been made and that said defendants had threatened and were then threatening to enter upon and appropriate the premises for the uses of fishing and to the irreparable injury and damage of plaintiff. (Tr. 8 and 9.)

In answering this allegation, defendants admitted the occupancy of Sand Island under the terms of the lease aforesaid during the years 1930 and 1931, but alleged that in August, 1931, the premises were abandoned and that cancellation of the lease was obtained from the Secretary of War on May 1, 1932 (Tr. 18). In making further answer to the aforesaid allegation, defendants alleged that the fishing operations described in the bill were in fact conductel upon sands of what is termed "Peacock Spit," the property of the State of Washington, and it is alleged that said premises were held under lease from said state. In short, it is alleged that the area of sands situate on the southerly shores of Sand Island (the area circumscribed in yellow—Map Tr. 58) is a part of Peacock Spit and not a part of Sand Island (Tr. 18). The answer then sets forth certain data which, it is alleged, supports the conclusion that the area in dispute comprises a part of Peacock Spit. It is further alleged in this connection that the disputed area is not located within the State of Oregon and that therefore the United States District Court for the District of Oregon is without jurisdiction; that the suit involved the

determination of the boundary line between the States of Oregon and Washington, and that said states are indispensable partise to the proceeding (Tr. 19 to 26, incl.)

The bill next sets forth the size and character of the fishing operations conducted upon Sand Island in respect to the years above mentioned, and this allegation is admitted with reiteration of the claim that such operations were conducted upon Peacock Spit and not upon Sand Island.

It is next alleged that the defendants are without title or interest in and to said premises and should be restrained from occupying the same, and this allegation is denied in the answer (Tr. 9, 10, 28).

Plaintiff prayed for injunctive relief, a declaration of title, and for costs (Tr. 10).

It was stipulated at the opening of the trial that allegations of the answer of affirmative character should be deemed denied by plaintiff.

Appearance by the Attorney General of the State of Washington

On the 3d day of June, 1935, seven days prior to the commencement of the trial, a representative of the Attorney General of the State of Washington, purporting to represent the State of Washington, filed what is styled a "Motion to Intervene," unverified, in which it was stated:

"That the State of Washington is the owner of the lands which defendants now occupy and upon which said defendants operate drag seines as alleged in Paragraph IX of the amended bill of complaint, and the use and occupancy of which lands plaintiffs now seek to restrain the defendants."

It was next stated that the State of Washington had leased the said premises to the Baker's Bay Fish Company, one of the defendants herein, for a period of five years from and after the 22nd day of December, 1932, at an annual rental of $5,000, and that the defendants *"are occupying and using said premises under said lease,"* and that the State of Washington has an interest in this controversy. This motion to intervene was not accompanied by a complaint or petition in intervention, nor did the representative of the Attorney General disclose the authority under which the motion was filed. (Tr. Wash. 44, 45)

By way of a consent order, so-called, and in the absence of plaintiff's counsel, United States District Judge Fee allowed the motion, giving the State of Washington until June 8 to file its "complaint of intervention," and allowed the United States five days to move against the consent order (Tr., Wash. 46). The complaint in intervention, permitted by the terms of Judge Fee's order, was never presented or filed within the time allowed for that purpose, or at all.

On the 7th of June, 1935, plaintiff filed a motion

to set aside and vacate the order of Judge Fee, and this motion was heard and sustained by Judge Cavanah on the 11th day of June, 1935, the day the trial opened. (Tr., Wash. 49, 50, 51) At the same time the court refused to permit the representative of the Attorney General to participate in the trial (Tr., Wash. 50,51.)

Appearance by the Attorney General of the State of Oregon

On the 10th day of June, 1935, a day before the trial began, a representative of the office of Attorney General of Oregon filed with the court a motion to intervene, unverified, in which it was stated that the premises in dispute were the property of the State of Oregon and that said State claimed the right to possession thereof. This motion was not accompanied by a petition or complaint in intervention, nor was such a petition or complaint ever filed in the proceeding, or presented for filing.

The motion was denied, and the Attorney General was denied leave to participate in the trial of the case.

IMPORTANT EVIDENCE

All questions arising in the case, both of law and of fact, trace their validity or invalidity to an interpretation of the changes which have occurred in the estuary of the Columbia River by the action of the waves, winds, tides and currents. This is fundamental. Changes have taken place in the placement and displacement of sand bodies, and this court is asked to

give legal effect to these changes.

A conception, then, of what the changes are, how they came about, and what legal recognition has been accorded them in the past becomes of first and prime importance. The questions of jurisdiction, of parties, and those relating to the law of accretion may all be proximately resolved upon an accurate understanding of the physical phenomena which have brought about the changes and of what the changes actually consist.

Physical Characteristics of the Sands and Spits in the Immediate Vicinity of Sand Island and Peacock Spit.

The area of sands embraced by this controversy is assumed to have maintained a substantial identity from the time of its severance from the body of sands projecting southerly from Cape Disappointment. (P. Ex. 1, maps for 1929, et seq.) But this is only partly true. The waves and currents from the ocean have direct access across the Columbia River Bar, and the spits or sand bars are subjected to constant and frequently terrific assaults (Tr. 152). The channels and the sand bars were being constantly shuffled about, and during an occasional storm sand bars of considerable dimension would be created or destroyed. The testimony of Mr. Woodworth, who is the officer in charge of the Coast Guard Station at Cape Disappointment and who appeared in behalf of the plaintiff, is informative in this regard:

"They run from 6 feet to 12 feet. I am now referring to the breakers that break on Sand Island and the sands around Sand Island. I have been on Sand Island from time to time and have observed conditions there. The waves and tides and currents have direct access from the bar to the sands of Sand Island and the sands immediately south thereof. . . . I have noticed (breakers) on the shores of Sand Island I would judge to be from eight to ten feet, just high enough to go over the boat. The breakers during these severe storms will move the sand around and wash it in or wash it out, or flatten it down. Referring to the sand south of Sand Island, I have seen a sand washed out, and I have seen it washed in over a period of one month. Sometimes it will take a day, and sometimes it will take a week. *What I mean by a sand is this whole body of sand between Sand Island west of Cape Disappointment which are all low sands,* and the breakers go clear over . . . .

. . After one of these storms had hit the fringe of sand south of Sand Island our channel would change and we would sound to find out where the deep water was. When I say change, I mean it would fill in and at times it would be changed as to line and contour and it would alter the low water mark connoting the fringe of sands south of the island there. Some of these sands would move perhaps 100 or 200 or perhaps 300 feet at a time.

That is, a single storm might move them that much." (Tr. 152,153.)

Mr. Glasgow, a witness for plaintiff and a government engineer, who for thirteen years has made annual surveys of Sand Island and the estuary (tr. 178,) testified that the changes were not due alone to the storms:

"The channels shift from east to west; that is, the main movement in that vicinity; an easterly-westerly movement of the channel on the waters of Baker's Bay. . . . There is a large body of water there, and on the lower tides they have a tendency to wash deep channels, and then for a period of some time there will be higher tides, and they won't go to that depth, and what washed out the channel one day will build up into a sand spit maybe ten or fifteen days later, during the differences in tides. It is not always due to storm." (Tr. 172)

"I have noticed a channel shift fifty or seventy-five feet in the course of a week. I can't state any specific distance as to how far a channel may shift in a month, but in a couple of cases down there, in the course of a month, it shifted a couple of hundred feet that I know of. I am referring to the channel between Sand Island and Cape Disappointment, noted on the map as the 'Ilwaco' Channel. (North Ship Channel) In a period of six months I have seen that channel shift a thou-

> sand feet. I have seen these extensive shifts on more than one occasion but not more than once to the extent of a thousand feet or more. It is not always jumping like that. The channel is in a constant state of flux and change, and the change is more violent and drastic in the winter time than it is in the summer time.' (Tr. 173; see also 174)

For further elucidation on this subject, attention is invited to the testimony of Mr. Parker (Tr. 137); Mr. Aho (Tr. 160, 161); Mr. Brown, defense witness (Tr. 262).

It is highly debatable whether the body of sands we are concerned with maintained a recognizable identity after the year 1929. New bodies of sands were being formed constantly and other bodies were with equal consistency being washed away. It would be quite beyond the powers of human ingenuity to determine to what extent an identity was maintained. True, the area in the estuary exhibited a tendency favorable to the formation of sand deposits, but large blocks of the area would disappear over night—by the operation of mild storms and ordinary river swells—and similarly other bodies would be built up.

The North Ship Channel and Peacock Spit

Peacock Spit is first designated on the maps as such in the year 1879. (Plaintiff's Ex. 1, Map 1879). In 1895, the spit began to break up and by 1896 the sands which composed the spit disclosed a tendency to

drift easterly towards Sand Island. Curiously enough, the sands of Peacock Spit stood in the same relative position in the year 1896 as they did in 1929. (Maps for those years, Plaintiff's Ex. 1). In 1897 a body of these sands had broken off from Peacock Spit, consolidated and formed what is termed on the map "Republic Spit." As this spit made its way across the channel to form ultimate union with Sand Island in the year 1899, it caused the North Ship Channel to shoal and finally changed the course of that channel, locating it at about the same point where the North Ship Channel was located in the year 1932 (See Plaintiff's Ex. 1, maps 1932, 1899).

The movement of the sands thus broken off from Peacock Spit in the year 1896 brought about in four years a change in the location of the North Ship Channel almost identically equivalent with the change effected in the four-year period beginning in 1929. And in each instance the sands which had broken off from Peacock Spit attached themselves, by slow and imperceptible progression, onto Sand Island. What had formerly been Republic Spit ceased to exist, and thereafter those sands became part and parcel of Sand Island.

In 1908 the United States Supreme Court had before it the problem of locating the North Ship Channel as a basis for delineation of the boundary line between the States of Oregon and Washington (211 U. S. 127, Washington vs. Oregon). The Court likewise

had before it the maps noting the changes which had occurred in the North Ship Channel between the years 1896 and 1900 (See Chart "B" at p. 132 of the decision). The shift in the channel, occasioned by the action of the Republic Spit, was recognized by the Court, and the new channel was defined as the boundary between the states. And the Spit which had become attached to Sand Island, assuming that it had maintained an identity, and which had caused the shift in the channel, was recognized as an addition to and a part of Sand Island. Defendant's contention that the North Ship Channel ceased to exist in the face of such a shift is contrary to the plain implication of the decision of the United States Supreme Court above adverted to. The same is true in respect to the contention that the sands on the southerly shores of the island are still a part of Peacock Spit.

Evidence Pertaining to the Interest of the State of Washington

In the answer defendants adopted one all-inclusive theory of defense, to-wit: that the area of sands in question were located in the State of Washington; that they comprised a part of Peacock Spit, and that these defendants held the same by virtue of a lease executed by the State of Washington. The implication was, of course, that the State of Washington was claiming the premises. The hypothesis of this defense rests upon three assumptions of fact, that is (1) that the State of Washington leased the premises to defendants; (2)

that legal recognition has been accorded said leases; and (3) that the physical evidence shown by the maps forming Plaintiff's Exhibit 1 disclosed the premises to be a part of Peacock Spit. These assumptions of fact will be considered in order with relation to the record.

(1) *The contention that the State of Washington leased the premises to defendants*:

The State of Washington has not at any time leased or purported to lease the premises embraced in this proceeding. The two leases under which the claim is predicated are before the court and comprise Defendants' Exhibits No. 22 and 23. The first lease (Defendants' Exhibit No. 22) was executed on the 7th day of May, 1928, and purported to lease "Peacock Spit, lying southeasterly of the main channel range as shown *upon the United States Coast and Geodetic Survey Chart No.* 6151 *of the Columbia River.*" There can be no misconstruction of the language of the description. It referred to Peacock Spit as it existed at that time or prior thereto. Though defendants did not produce for the record the map referred to in the lease, we do have as a part of Plaintiff's Exhibit No. 1 the map for the year 1928, which shows the location of Peacock Spit, the area mentioned in the lease.

The United States has never questioned, and does not now question, the right of the State of Washington to lease the premises described in the lease. It is undisputed in the record that the State of Washington

has leased Peacock Spit for a great many years and that fishing sites on Peacock Spit are valuable as seining sites, but the lease by express terms does not mention, either directly or by implication, that the area we are concerned with was or is a part of Peacock Spit. The seining sites on Peacock Spit, on which fishing operations were carried on by appellants under the lease from the State of Washington, are situate some two miles distant from the location we are here concerned with. (Tr. 225, 276, 277) The same thought is applied with reference to the lease, Defendants' Exhibit No. 23 The description of the lands named in the lease is identical with that of Exhibit No. 22, and only purports to lease Peacock Spit as located on the map of 1928, or the maps of prior years, and no representation or claim of ownership is avowed as respects the body of sands which formed the union with Sand Island in the years 1930 and 1931.

(2) *The contention that legal recognition has been accorded the leases to Peacock Spit*:

This is true. Both, the brief of appellants and the answer, contain citations of cases wherein the leases above-mentioned have been discussed by the courts, including this court, but such cases are confined to the terms of the leases heretofore discussed and simply affirm what has not been denied by anybody—that the State of Washington has validly leased Peacock Spit from time to time for seining purposes. The cases affirm the description mentioned in the leases and are

strictly confined in the scope of their application to the body of sands styled as Peacock Spit as it existed at or prior to the year, 1928, the time the description of the two leases was prepared.

The sands with which these litigations are involved admittedly did not assume their present entity until some years after the descriptions contained in the leases had been composed.

The cases mentioned by counsel are as follows:

Williams Fishing Co. vs. Savage as Commissioner of Public Lands of the State of Washington, 152 Wn. 165; 277 Pac. 459

Pacific Savings & Loan vs. Savage, 155 Wn. 44; 248 Pac. 744.

Williams Fishing Co. vs. Savage, 164 Wn. 44; 248 Pac. 744

Opinions of the Attorney General. Vol. 34, pp. 435, 436

United States as trustees, etc. vs. McGowan; United States vs. Bakers' Bay Fish Co., et al, 2 Fed. Sup. 426

Same case, 62 Fed. (2) 955 (9th)

Same case, 290 U. S. 592

The record affirmatively shows that the defendants have not taken seriously the claim that the premises here in dispute are a part of Peacock Spit

and that they are embraced within the description of the two leases above adverted to. As late as 1934, when the United States offered fishing sites on Sand Island for lease, which all will agree included the premises here in dispute since they are the only available sites on the Island, the defendants entered their bid for lease of the premises just as they had for many previous years (Tr. p. 186, 187, 188) Then again, just prior to the beginning of the trial in this case, we find Mr. Bowerman, of counsel for the defendant, Columbia River Packers Association, appearing before the Board of Control of the State of Oregon, urging that the State of Oregon offer these identical premises for lease. (Tr. p. 202).

These three inconsistent positions taken by defendants are established by undisputed testimony in the record. No attempt was made to refute the facts thus established. Judge Cavanah commented on this phase of the evidence in his opinion, as follows:

> "From their actions they seemed to be somewhat in doubt as to just where these disputed sites are located for they were content in accepting, first, a lease from the United States stating that they were in the State of Oregon and owned by the United States, second, that in their lease with the State of Washington the sites were located in that state, and third, that they are now interested in the action of the State Land Board of Oregon in leasing them as being in the State of Oregon. But

however inconsistent the position of the defendants may be in that respect, the conclusion is reached under the evidence that the disputed fishing sites as described in the complaint are accretions to Sand Island and they and the adjacent tide and shore lands up to high water line are located within the state of Oregon and are owned by the United States. . . " (Tr. 39)

(3) *The contention that the physical evidence contained in the maps (Plaintiff's Exhibit No.* 1) *show the premises to be a part of Peacock Spit*:

The maps speak for themselves on this point. Particular attention is invited to the maps from 1929 to 1934, inclusive; the map for the year 1935 (Plaintiff's Exhibit No. 5), and the maps for the years 1896 to 1900, inclusive. This feature of the question has been heretofore discussed in some detail—ante p.

Evidence pertaining to an alleged interest in the properties claimed by the State of Oregon.

It was not contended in the pleadings that the State of Oregon owned or claimed an interest in the properties here in dispute. The fact of the matter is that Appellants affirmatively pleaded that the State of Oregon neither held *nor claimed* such an interest. The allegation is contained in the amended answer in the following language:

> "At no time since Oregon was admitted to the Union has it claimed that said premises or any part thereof were within the State of Oregon or exercised or claimed the right to exercise any jurisdiction over it."

In the face of the issue thus joined, still it is suggested that the State of Oregon does claim an interest.

It is true that in the years 1928 and 1929 the State of Oregon laid claim to a body of sands situate in the mid-Columbia region and that question arose between the States of Oregon and Washington over title thereto. (Tr. 230). But the record likewise shows that this claim of both the respective States was promptly abandoned and never reasserted. Probably this was for the reason that the body of sands had been quite completely washed away by the year 1929. See maps, 1928, 1929, 1934 (area circumscribed by red line), P's exhibit 1. Certainly the claim made at that time would be without application to the body of sands which assumed its present entity on or about the years 1930 or 1931. And it is significant in this regard that when the premises were leased by the United States to these appellants for a period of five years, beginning with the year 1930, no protest or objection is found to have been made by either of the States. No protest was registered upon the occupancy of said premises under said lease for the years 1930 and 1931.

At pages 13, 15, 17 and 18 of Appellants' Brief, reference is made to testimony "introduced by Ap-

pellee" with respect to alleged claims of the State of Oregon. Counsel neglected to note that this testimony was given by Mr. A. E. Clark, of counsel for Appellants' and that it was of purely voluntary character, injected into the record by Mr. Clark when he was being questioned with respect to the fishing operations contemplated by his Packing Companies.

It may be urged that the attempts to intervene made by the Attorneys General of Oregon and Washington on the eve of the trial are evidence that the respective states do claim title to the premises. Complaint in the case was filed on the 15th day of August, 1934, and not until the 3d day of June, 1935, a few days before the trial began, did the Attorney General of the State of Washington file the motion to intervene. A similar motion was filed by the Attorney General of the State of Oregon on the morning before the trial opened. The motions were not accompanied by petitions or complaints in intervention, nor were such documents ever filed. The claims arose simply upon the unverified statements of the representatives of the Attorneys General that the said states were asserting a claim of title. We are not permitted to know the bases of the claims, since no pleadings were ever proffered. Though the State of Washington was given until June 8 to file its complaint in intervention, no such complaint was filed or presented for filing.

The legal effect of these appearances by the Attorneys General is discussed, beginning at page 38 of

this brief. It will there appear that what purported to be appearances by the States were simply appearances by the Attorneys General, who were without authority to enter such appearances or to in other manner bind the respective States.

The threats of continuing trespass

It is admitted by appellants that the disputed area was occupied by them during the years 1932, 1933 and 1934. (Tr. p. 118). This was after Appellants' lease of the premises from the United States had been cancelled by appellee in 1932.

On the 22d day of December, 1932, one of the appellants, Bakers' Bay Fish Company, obtained a lease from the State of Washington to Peacock Spit, and this lease contained the same description found in the earlier leases from the State, heretofore discussed at page 15 & 16 of this brief. This last named lease was to run for a period of five years from the 22d day of December, 1932 (Tr. 294). A one-half interest in the lease was assigned to appellee, Columbia River Packers Association (Tr. 297). Under this lease defendants had claimed and were claiming the right to occupancy of the disputed area during the years 1932, 1933 and 1934, and were claiming such right of occupancy under the lease at the time of the trial in 1935 (Tr. p. 204).

The lease was not limited by its terms to the use of the premises for drag seining. It was simply a blanket lease without restrictions as to use. At the fall elec-

tion in 1934 the people of the State of Washington passed initiative law No. 77, (Chap. 1, Laws of Washington 1935), and Section 6 thereof prohibited the use of drag seines. The contitutionality of the Act was argued before the Supreme Court of the State of Washington some weeks prior to the trial (Tr. 204), and the Act was declared constitutional in the case of State Ex Rel Campbell vs. Case, 47 Pac. (2) 44.

Promptly thereafter the defendants sought to circumvent the operation of the above statute by taking the position that the sands in dispute did not form a part of Peacock Spit, but rather were an independent body of sands and the property of the State of Oregon. For the purpose of this claim the sands were styled as "Oregon Sands." Thereupon the defendants applied to the State Land Board of the State of Oregon and requested that the said Board offer for lease a large part of the area of sands here in dispute (Tr. 201, 202, and Plaintiff's Exhibit No. 1, Map of 1934, area circumscribed by red line). The Board did not offer the sands, or any part of them, for lease, but a hearing was had on the application made by defendants. Meanwhile the defendants obtained licenses for fishing the premises—these from the Master Fish Warden of Oregon (Tr. 207).

Counsel for appellant Barbey, Mr. A. E. Clark, admitted very frankly that he and Mr. Bowerman, co-counsel, were extending their best efforts to obtain some kind of color of authority under which occupa-

tion of the premises for drag seining purposes could go forward. The defendant companies had succeeded in occupying the fishing locations on Sand Island previously, from about the year 1922 up to and including the year 1934 (Tr. p. 99) the last three years without a lease from the United States and the assumption is not unwarranted that their efforts in this last instance would be as successful as they had formerly been.

At page 198 of the transcript appears the following:

"(Questions by Mr. Hicks —Testimony of A. E. Clark, of counsel for defendant, Barby)

Q. Just a moment please. And do you recall at that time whether or not I stated to you that if such an operation was not contemplated this case might, under instructions from Washington from the Attorney General, be continued, and didn't I ask you to ascertain that fact —that is, whether an operation was contemplated and to let me know, and upon that decision the case would be set down for hearing or not as the facts might show.

A. That is part of the conversation that occurred." (See Tr. 198, et seq.)

The case promply proceeded to trial, evidencing the grave apprehension of the United States that the trespassing would forthwith continue as it had during the years preceding.

It is interesting to observe in this connection that Mr. Clark, of counsel for the appellant packing comp-

anies, was very anxious to have the briefs filed with the trial court within a period not later than three weeks after conclusion of the trial, because it was anticipated that appellants would in all probability desire to resume fishing. As Mr. Clark frankly stated it, "We may want to fish down there." (See typewritten transcript of record, pa. 487.)

Under these facts, coupled with the other evidence in the record, Judge Cavanah found that the threats and the occupancy, such as they were, were adequate to warrant the issuance of the injunction.

Miscellaneous Points of Evidence

Reference is made at several junctures in the brief of Appellants to the original complaint filed in the proceeding wherein it was alleged that the Defendants "fraudulently entered into pretended lease with the State of Washington," etc., of the properties here in dispute. (App. Brief, p. 7.) From this allegation, counsel emphasizes that the United States knew all the time that the State of Washington was claiming the premises. While we do not deem it material whether the State claimed the properties or not, a correction should be noted with respect to counsel's conclusion. The fact is quite to the contrary, as evidenced by the fact that an amended complaint was promptly filed, striking out this allegation. The fact is that the Appellee knew that such a claim was being asserted by the Appellants, and assumed that the lease from the State

of Washington described the premises in controversy. Upon learning that the description referred only to Peacock Spit, as it existed in 1928 and during prior years, the amendment was made in the interest of a correct allegation of the facts as we understood them to be.

It is suggested on pages 30 and 31 of Appellants' Brief that the fishing operations conducted by Appellants during the years 1932, 1933 and 1934 were not on the premises described in the lease obtained by them in the year 1930 and which was to run for a period of five years. (P.'s exhibit 3, Tr. 100.) This is simply a reiteration of the claim that these properties are a part of Peacock Spit, and therefore simply begs the entire question in respect to the ownership of the properties. Such a conclusion is not helpful. The premises covered by the lease of 1930, supra, are charted and discussed in the case of *Strandholm v. Barbey,* 145 Oregon 427, 26 Pac. (2) 46, which case was by reference incorporated in the Second Amended Complaint, and the court's attention is invited to that case for a delineation of the properties described in the lease last above referred to.

Testimony was received in the record to the effect that the southerly shore of Sand Island had progressed northerly after the year 1928 and that the area of sands we are here concerned with had built up by accretion to form the contact with Sand Island. A Mr. McLean was called by appellants to establish this proposition,

and his testimony on this point is recorded at pp. 227 and 228 of the transcript. The device chosen by the witness to find a recession northerly of the southerly shore line of Sand Island to a distance of some thousands of feet is interesting, but conspicuous for its absurdity.

The court may make the calculation very easily by reference to the maps for the years 1928 to 1934, inclusive. The southerly shore line of Sand Island, *in respect to its location with reference to the sands in question,* was built out southerly during this period rather than northerly as testified by the witness. This deduction may be readily confirmed by reference to the maps for the years 1928 to 1934, inclusive. By taking a location point at the cross marking latitude 46° 16′, where it intersects longitude 124° 2′ on the maps for those years, and drawing a line at right angles to the southerly shore of Sand Island, it will be readily observed that the shore line of said island was actually built up southerly during those years. Though the calculation is not deemed to be important, in view of the grant of Sand Island to low water mark and thereby of the sands which occupy such area, the court's attention is directed to the matter as an aid to clarification of the record.

The aero photographs of the island and adjacent sands, comprising Defendants' Exhibits No. 6, 15, 17, and 18, and Plaintiff's Exhibits No. 29, 30, and 31, are interesting and will, perhaps, be helpful to the court.

It is to be recollected that these photographs were taken at extremely low tide and that at high tide the entire area southerly of the high water mark of Sand Island was quite completely submerged.

POINTS AND AUTHORITIES

I

All intendments are resolved in favor of the ruling of the trial court in the absence of obvious and manifest error. Scope of the review.

Gila Water Co. vs. International Finance Corp. et al., (CCA 9) 13 F. (2d) 1.

Easton vs. Brant et al., (CCA 9) 19 F. (2) 857,859.

Graff vs. Town of Seward, Alaska, (CCA 9) 20 F. (2) 816.

Idaho Min. & Mil. Co. vs. Davis, (CCA 9) 123 F. 396.

O'Brien, Manual of Federal Appellate Procedure, p. 58 (Ed. 1929) and cases cited.

1934 Cum. Sup. to O'Brien's Manual of Federal Appellate Procedure, p. 54 and cases cited.

Conqueror Trust Co vs. Fidelity & Deposit Co. of Md., (CCA 8)63 F. (2d) 833, 837

II

The United States District Court for the District

of Oregon did not err in denying the motions of the States of Oregon and Washington, respectively, for leave to intervene.

(a) Neither the State of Oregon nor the State of Washington has consented to become a party, and intervention may not be allowed in the absence of such consent.

Constitution of the State of Wash., Remington Comp. Code, 1932, Vol. 1, p. 404.

O'Connor vs. Slaker, 22 F. (2) 147.

United Trucking Co. vs. Duby, 134 Ore. 1; 292 Pac. 309.

59 C. J. 323, Sec. 481.

(b) The motions to intervene, respectively, being the only documents filed by the said states, do not state facts sufficient to warrant intervention.

Toler vs. East Tennessee V. & G. R. Co., 67 F. 174, 175.

Simkins Federal Practice, Secs. 717, 718, 719, pp. 676, 677 (Ed. 1934).

Powell vs. Leicester Mills, 92 F. 115, 116.

Clark vs. Eureka County Bank (Steinmetz et al intervening), 116 F. 534, 536 (D. C. Nev. 1902).

(c) The allowance of intervention by the Attorneys General, respectively, would have been in contra-

vention of Equity Rule No. 37.

Hughes Federal Practice, Vol. 1, *Sec.* 64, p. 51 (Ed. 1931)

Evansville and H. Traction Co. vs. Henderson Bridge Co., 134 F. 973

Weber Show Case and Fixture Co. vs. Waugh, 42 F. (2) 515 (D. C. Wash.)

Equity Rule No. 37.

King vs. Barr et al., 262 F. 56 (CCA 9); Cert. denied 253 U. S. 484; 64 L. Ed. 1025; 40 Sup. Ct. 481.

Union Trust Co. of Pittsburg, Pa., vs. Jones et al., 16 F. (2) 236 (4th).

State of North Carolina vs. Southern Railway Co., (CCA 4), 30 F. (2) 204.

(d) The allowance of the motions to intervene, respectively, was within the sound discretion of the court.

Equity Rule No. 37.

Board of Drainage Commissioners vs. Lafayette South Side Bank, 27 F. (2) 286, 293 (CCA 4).

United Sattes vs. Ladley, 51 F. (2) 756.

III

The Trial Court exercised its discretion under Equity Rule No. 37 in denying the application of the Attorneys General for leave to intervene.

IV

Neither the State of Oregon nor the State of Washington is an indispensable party to this suit.

(a) Affirmative discussion.

Equity Rule 39.

Sec. 111, T. 28, U. S. C. A.

Williams vs. United States, 138 U. S. 514, 516.

Hughes Federal Practice, Vol. 5, Sec. 3045, pp. 226, 227.

United States vs. Minnesota, (1926) 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539.

United States vs. Lee, 106 U. S. 196, 1 Sup. Ct. 240.

United States vs. Peters, 9 U. S. (Cranch), 115, 139.

Rose vs. Sanders et al., same vs. Calaveras Water Users Assn., 69 F. (2) 339 (Feb. 28, 1934).

Payne vs. Hook, 7 Wall (74 U. S.) 425, 431; 19 L. Ed. 260.

Williams vs. Crabb, 117 F. 193 (CCA 7, 1902); Cert. denied 187 U. S. 645.

O'Connor vs. Slaker, 22 F. (2) 147 (8th).

(b) Cases in support of appellants' contention discussed.

California vs. Southern Pacific Co., 157 U. S. 229, 39 L. Ed. 383.

Texas vs. Interstate Com. Com., 258 U. S. 158, 163; *Penna. vs. W. Virginia,* 262 U.S. 553, 617.

New Mexico vs. Lane et al., 243 U. S. 52, 61 L. Ed. 588.

Chicago, M., St. P. & P. Railroad Co. vs. Adams Co., 72 F. (2) 816.

Skeen vs. Lynch, 48 F. (2) 1044.

United States vs. Ladley, 51 F. (2) 756.

Equity Rule 37.

V

The shift in the North Ship Channel between the years 1929 and 1934 did not constitute an avulsion.

Washington vs Oregon, 211 U. S. 127

Washington vs. Oregon, 214 U. S. 205, 215

VI

The United States is the owner in fee simple of Sand Island and the tide flats which form its southern shore.

(a) General Statement of contentions advanced by appellants and respondent in support of their respective claims.

(b) The question poised.

(c) Discussion of cases cited by appellants in support of their contention.

Holman vs. Hodges, 112 Iowa 714, 84 N.W. 950, 58 L. R. A. 673.

Bouchard vs. Abramson, 118 Pac. 233, 160 Cal. 792.

Fowler vs. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162.

People vs. Warner, 116 Mich. 228, 239; 74 N. W. 705.

(d) Affirmative presentation of the rule applicable to the facts.

McBride vs. Steinweden, 72 Kans. 508, 83 Pac. 822 (1906).

Cyrus Webber vs. J. A. Axtell, 94 Minn. 375, 102 N. W. 915.

King vs. Young, 76 Maine 76, 49 A. Reps. 596.

Mulry vs. Norton, 100 N. U. 424, 3 N. E. 581.

Waring vs. Stetcomb, (Md. 1923) 119 Atl. 336.

(e) The properties here in dispute are the properties of the United States, by virtue of its grant from the State of Oregon.

Act of the State of Oregon granting Sand Island to the United States, Tr. p. 6.

Fellman vs. Tidewater Mill Co., 78 Ore. 1, 7; 152

Pac. 268.

Taylor Sands Fishing Co. vs. Benson, 56 Ore. 157; 108 Pac. 126.

VanDusen Investment Co. vs. Western Fishing Co., 63 Ore. 7, 124 Pac. 677, 126 Pac. 604.

Armstrong vs. Pincas, 81 Ore. 156, 158 Pac. 662.

State vs. Imlah, 135 Ore. 66, 294 Pac. 1046 (1931).

Shively vs. Bowlby, 152 U. S. 1, 38, 39.

Strandholm vs. Barbey, 145 Ore. 427, 439; 26 Pac. (2) 46.

Columbia River Packers Assn. vs. United States, 29 F. (2) 91.

Moore vs. Willamette Transportation Co., 7 Ore. 359.

Coquille Mill & Mercantile Co. vs. Johnson, 52 Ore. 547, 555.

Weems Steamboat Co. vs. Peoples Steamboat Co., 214 U. S. 345, 53 L. Ed. 1028.

Cook vs. Dabney, 70 Ore. 529, 139 Pac. 721.

ARGUMENT

Point I

All intendments are resolved in favor of the ruling of the Trial Court in the absence of ob-

vious and manifest error. Scope of the review.

Attention is briefly called to the decisions of this court which hold that the findings of the trial court, based on evidence taken in open court, will not be reviewed by an appellate court, except for plain or obvious error. *Gila Water Co. vs. International Finance Corp., et al.,* (CCA 9) 13 F. (2d) 1; *Easton vs. Brant, et al.,* (CCA 9), 19 F. (2) 857, 859; *Graff vs. Town of Seward, Alaska,* (CCA 9) 20 F. (2) 816; *Idaho Min. & Mil. Co. vs. Davis,* (CCA 9) 123 F. 396.

We understand the rule to be that the reviewing court will not weigh the evidence in support of the findings, but will only consider whether there is any substantial evidence to support the same. O'Brien, Manual of Federal Appellate Procedure, p. 58 (Ed. 1929) and cases there cited.

The findings are presumptively correct and will not be disturbed unless a serious mistake of fact appears; and where there is substantial evidence to support the findings of the trial court, it is immaterial that the appellate court might differ with the process of reasoning employed to reach the finding. 1934 Cumulative Supplement to O'Brien's Manual of Federal Appellate Procedure, p. 54, and cases there cited; *Conqueror Trust Co. vs. Fidelity & Deposit Co. of Maryland,* (CCA 8) 63 F. (2d) 833, 837.

ARGUMENT

Point II

The United States District Court for the District of Oregon did not err in denying the motions of States of Oregon and Washington, respectively, for leave to intervene.

(a)

Neither the State of Oregon nor the State of Washington has consented to become a party, and intervention may not be allowed in the absence of such consent.

The Constitution of the State of Washington provides as follows:

> "Suits against the State. The Legislature shall direct by law in what manner and in what courts a suit may be brought against the State. Article 2, Section 26, Constitution of the State of Washington, Remington Comp. Code 1932, Vol. 1, p. 404."

The State of Washington has passed no law permitting the United States District Court for the District of Oregon to adjudge any rights claimed by said State in respect to the real property allegedly belonging to said State. Of this fact the court is asked to take judicial notice. *O'Connor vs. Slaker*, 22 F. (2) 147.

The same identical situation applies with respect to the attempt made by the Attorney General of the State of Oregon to intervene in behalf of said State.

See *United Trucking Co. vs. Duby,* 134 Ore. 1, 292 Pac. 309.

Whether the appearance by the state's Attorney General for the state in a federal court amounts to a voluntary appearance by the state, so as to give the court jurisdiction of a suit against the state, depends upon the authority of the Attorney General, and neither he nor any other state officer can waive the state's immunity under the above constitutional provision in the absence of a state statute expressly authorizing it to be done, and if his appearance for the state is in excess of his power, it does not constitute a voluntary submission by the state to the jurisdiction of the court. This rule, we submit, is universally recognized. The authorities are collated and ably discussed in the case of *O'Connor vs. Slaker,* supra.

A good general statement of the rule, with numerous citations of authority, is contained in 59 C. J. 323, Sec. 481, as follows:

> "Generally a state is bound by the acts of an attorney representing it by the proper authority, to the same extent that a private litigant is bound by the acts of his attorney; but an attorney-general, or other officer properly appearing for the State, can not assent to a thing which the legislature alone has power to assent to; and *if a state has not consented to be sued, the attorney-general can not, in the absence of special and explicit authority therefor, make the state a party defendant,* or give the court jurisdiction over it, by his general appearance in an action against the state or its officers. 59 C. J. 323. An attorney-general is generally

held to derive no power, in this latter respect, from a general statute making it his duty to institute and defend suits, whenever necessary, in his opinion, to protect and secure the interests of the state. Citing numerous cases."

(b)

The motions to intervene, respectively, being the only pleadings filed by the said states, do not state facts sufficient to warrant intervention.

The only documents filed by the States, respectively, in support of the attempts at intervention were the unverified motions of the Assistant Attorneys General. The motions simply state a conclusion, *and no facts are pleaded.* (Tr. Wash. pp. 44, 45), (Tr. Ore. pp. 31, 32, 33.) Though by the court's order under date of June 3, 1935, the Attorney General of the State of Washington was given until June 8 to file a petition in intervention, no such petition or complaint was ever filed or presented for filing.

Intervention may not be accomplished in this peremptory and summary manner. The courts require pleadings and allegations of fact, duly verified, so that the trial judge and the parties already before the court may know something concerning the nature of the claim that is sought to be presented. From the pleadings that are filed the court must be able to determine (1) that there will be no delay to the plaintiff in prosecuting his suit, (2) that the pleading is reasonably sufficient to effect the purpose intended, and (3) that

it is a proper case for intervention. See *Toler vs. East Tennessee V. & G. R. Co.*, 67 F. 174, 175; Simkins Federal Practice, Secs. 717, 718, p. 676 (Ed. 1934).

Any of the parties to a suit may contest an application for intervention and have the right to have all of the grounds upon which the application is based specifically set forth. See *Powell vs. Leicester Mills,* 92 F. 115, 116; Simkins Federal Practice, Sec. 719, pp. 676, 677 (Ed. 1934).

Where there is an adequate allegation of the facts showing that petitioner is entitled to intervene, the petition must be taken the same as a complaint which fails to state facts sufficient to constitute a cause of action and an objection to its sufficiency may be taken at any time. *Clark vs. Eureka County Bank* (Steinmetz, et el., intervening), 116 F. 534, 536 (D. C. Nev. 1902).

The motions to intervene filed by the respective Attorneys General on the very eve of the trial scarcely afforded appellee opportunity to register full and complete objections. The applications were not, we submit, timely made.

(c)

The allowance of intervention by the Attorneys General, respectively, would have been in contravention of Equity Rule No. 37.

Equity Rule No. 37 provides that "any one claiming an interest in the litigation may at any time be per-

mitted to assert his right by intervention, but the intervention shall be in subordination to and in recognition of the propriety of the main proceeding."

The crux of the claim of the Attorney General the State of Washington is that the property in dispute is situate within the State of Washington and that said State is the owner thereof. We understand the rule to be that the jurisdiction of the United States District Court does not extend beyond the limits of the judicial district of which it is the District Court, to adjudicate rights with respect to real property situate without the district. Hughes Federal Practice, Vol. 1, Sec. 64, p. 51 (Ed. 1931); *Evansville & H. Traction Co. vs. Henderson Bridge Co.*, 134 F. 973; *Weber Show Case & Fixture Co. vs. Waugh*, 42 F. (2) 515 (D. C. Wash.).

If this view of the law is correct, an intervention based upon the proposition that the property is situate outside the jurisdiction of the court clearly would not fall within the limits prescribed by Equity Rule No. 37. It could not be said that that would be a recognition of the propriety of the main proceeding.

In the case of *King vs. Barr, et al.*, 262 F. 56 (CCA 9); Cert. denied 253 U. S. 484; 64 L. Ed. 1025; 40 Sup. Ct. 481, this court held that an intervener can not attack the jurisdiction of the court. We quote from the opinion:

> "An intervener can not challenge the court's jurisdiction, because if the court is without jurisdiction, the proceedings are void and without ef-

fect upon the intervener, and also because equity rule 37 provides that interventions shall be in subordination to and in recognition of the propriety of the main proceeding."

Attention is also directed to the case of *Union Trust Co. of Pittsburg, Pa., vs. Jones, et al.,* 16 F. (2) 236 (4th): We quote from the opinion, p. 239:

> "The position of the appellant, Union Trust Company, that upon intervention of the trustees under the mortgage, the proceedings should have been dismissed and that in what was done to the contrary the court was without jurisdiction, is clearly untenable. In any event, appellant itself, an intervener in the same litigation to assert its unsecured indebtedness, was not in a position to make such claim. It could not intervene and seek the aid of the court and at the same time attack and dispossess the court of its jurisdiction to proceed with the litigation in an orderly way. Equity Rule No. 37, 198 F. 28; 2 Foster's Federal Pr. 261; *Horn vs. Per Marquette Ry. Co.,* 151 Fed. 626, 633; *Cauffel vs. Lawrence,* (D. C.) 256 F. 714; *King vs. Barr,* 262 F. 56 (CCA 9th Circuit)."

See also *State of North Carolina vs. Southern Railway Co.,* (CCA 4), 30 Fed. (2) 204.

The application to intervene of the Attorney General of the State of Oregon stands in the same relative position.

(d)

The allowance of the motions to intervene, respectively, was within the sound discretion of the court.

The contention is based upon the facts noted in the record and the law applicable thereto.

Equity Rule No. 37 expressly provides that intervention shall be permitted within the sound discretion of the court. It is true that under a rare circumstance the right to intervention is absolute, but we contend that this is not such an instance.

Attention is respectfully directed to the case of *Board of Drainage Commissioners vs. Lafayette South Side Bank,* 27 F. (2) 286, 293 (CCA 4), where the court stated the rule as follows:

> "Nothing seems better settled than that an application of an intervener seeking to be admitted as a party to a pending cause is addressed to the sound discretion of the court, and where the application is denied, and such intervener left to avail himself of such rights as the law may afford him in other appropriate ways, that the order denying such application is an interlocutory, and not a final decree, and hence one from which no appeal lies. Authorities to support this position might be cited almost without number, but the following cases from the Supreme Court of the United States will be found to be especially applicable and entirely conclusive of the subject: *Connor vs. Peugh's Lessee*, 18 How. 394, 15 L. Ed. 432; *Ex Parte Cutting*, 94 U. S. 14, 24 L. Ed. 49; *Guion vs. Liverpool, etc., Ins. Co.*, 109 U. S. 173, 3 S. Ct. 108, 27 L. Ed. 895; *Credits Commutation Co. vs. U. S.*, 177 U. S. 311, 316, 317, 20 S. Ct. 636 (44 L. Ed. 782)."

For authorities showing that the right of intervention was not absolute as respects the States of Oregon and Washington, reference is made to Point IV

on the subject of indispensable parties, page 45 et seq. of this brief.

Counsel quote the case of *U. S. vs. Ladley,* 51 Fed. (2) 756, for the proposition that Judge Cavanah should have allowed the motions of the States to intervene, under the authority of his own decision previously rendered. That would appear to be a somewhat tortured conclusion. In that case the land in dispute was admittedly situate within the State of Idaho, the district in which the learned judge was sitting. What he did was simply to exercise the discretion accorded him under Equity Rule No. 37, and under the particular facts of that case, permitted the State of Idaho to intervene. No doubt the State had the requisite authority entitling it to intervene, and no doubt the said State had presented a petition or complaint in intervention, with a prayer for relief, etc., to the end that the court could pass intelligently upon the question. As we have shown, the facts relating to the attempted interventions here at issue, are at wide variance with those before the court in the Ladley case. We do not contend that under a proper circumstasce a State may not be joined as a party in the Federal District Courts without thereby depriving such courts of jurisdiction. The rule, as counsel have shown, is quite definitely stablished to the contrary.

ARGUMENT

Point III

The trial Court exercised its discretion under Equity Rule No. 37 in denying the application of the Attorneys General for leave to intervene.

It is suggested, at page 74 of appellants' brief, that the trial judge did not exercise its discretion in denying the motions to intervene, and reference is made to the transcript, at pp. 92, et seq. It was contended by appellee that the motions to intervene should be denied because they did not fall within the limitations of Equity Rule No. 37, prescribing that the intervention shall be in recognition of the propriety of the main proceeding. The provisions of the rule, including that part of it which vests discretion in the court for consideration of the question, were squarely before the court.

True, the court, in discussing the matter from the bench with the attorneys prior to its ruling, mentioned the subject of jurisdiction, but this related to the jurisdiction of the United States District Court for the District of Oregon to hear and determine a controversy respecting real property, which the applicant for intervention alleged was situate within the State of Washington. In this same connection the Court discussed the jurisdictional powers of the United States District Court for the District of Oregon to determine a boun-

dary dispute between states, and stated that questions of that character must look for solution to the United States Supreme Court in the exercise of its original jurisdiction.

But it is not a fair construction of the language of the court to say that the court did not exercise its discretion in overruling the motions to intervene. The court, at the time of its decision, did not give the basis for its decision on the motions, nor was one required. But from the fact that the ruling was made under Equity Rule No. 37, which is founded in its application upon a broad discretion vested in the court, it must be inferred that the court did exercise its discretion. It is sufficient answer to the suggestion to note that in the opinion of the court it is expressly noted that the court did exercise its discretion. Said Judge Cavanah in his opinion:

> "After considering these principles applicable to the application to intervene and the contention of the defendants under the circumstances disclosed by the record, the Court is of the opinion that *it did not abuse its discretion in denying intervention, which the courts hold it has in denying intervention or requiring the bringing in of the States.*" (Tr. 45, 46.)

ARGUMENT

Point IV

Neither the State of Oregon nor the State of Washington is an indispensable party to this suit.

(a)

Affirmative discussion of the subject.

The suggestion that the States of Washington and Oregon, or either of them, are indispensable parties, assumes the fact to be that the States, respectively, have asserted timely and genuine claims of ownership. To this proposition we contend that (a) neither of the States has asserted claims of ownership, and (b) under an assumption that such claims have been asserted, the States are not indispensable parties.

Elsewhere in this brief is contained an analysis of the record in respect to the alleged claims made by the States. (pp. 14 to 22, Incl.)

We now endeavor to show by an entire legion of authorities that under an assumption that the States, respectively, do assert a claim of title, the rule is that they are, nevertheless, not indispensable parties.

Before going into the decided cases, it is worthy of remark that the question of whether the State of Oregon owns or claims an interest in the premises is not within the issues raised by the pleadings. Appellants' sole theory, under the pleadings, is that the properties are part of Peacock Spit, within the State of Washington.

Attention is first directed to several elemental propositions. The United States District Court for the District of Oregon could not enter a decree binding upon the State of Washington in respect to land situate

in that State. The State of Washington may not by its consent vest jurisdiction in the Oregon court for the purpose of adjudicating the title to land situate in the State of Washington. The entire claim of the Attorney General and appellants is based upon the proposition that the disputed area of sands is situate within the State of Washington. By the operation of the statute prescribing and limiting the jurisdiction of federal district courts, by the operation of Equity Rule 39, and by virtue of Sec. 111, of Title 28, U. S. C. A., the State of Washington can not be prejudiced by such decree as may be entered by this court, and by no form of process may said State be brought within the jurisdiction of this court for purpose of the adjudication.

Equity Rule No. 39 provides as follows:

> "ABSENCE OF PERSONS WHO WOULD BE PROPER PARTIES. In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of absent parties."

Section 111 of Title 28, U. S. C. A., provides:

> "WHEN PART OF SEVERAL DEFENDANTS CAN NOT BE SERVED. When there are several defendants in any suit at law or in

> equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

This question has been many times before the courts and attention is directed to a few of the cases upon which to define the principles in their application to the particular facts.

In the case of *Williams vs. United States,* 138 U.S. 514, 516, it appeared that the United States granted to the State of Nevada two million acres of land in said State in lieu of certain sections which had theretofore been granted the United States by said State. In the Act which constituted the conveyance to the State, it was provided that the state authorities of Nevada should select for the purposes of the grant any unappropriated, non-mineral public land in said State, in quantities not less than the smallest legal subdivision. Upon such selection, it was provided that the said property should be certified to said State by the Commissioner of the General Land Office. Certain of the lands were duly certified to the State under the Act, and thereupon Williams, the appellant, applied to the

proper officers to purchase one of the said tracts. Pursuant to the application, a contract was entered into between the State and the appellant for the sale to him of the lands in controversy; he, at the time, paying one-fifth of the purchase money and contracting to pay the balance in subsequent annual instalments. Shortly thereafter the United States instituted the present suit in the Circuit Court for the District of Nevada against Williams alone. It was alleged in the bill that the lands were improperly certified to the State; that in equity it had no title, and its contract with the appellant transferred nothing to him. The prayer was for cancellation of the contract between the appellant and the State of Nevada, and an adjudication that the appellant had no title or interest in such lands. *Appellant took the position that the suit could not be maintained because the State of Nevada was an indispensable party, it holding the legal title, and that said State had not been joined.* To this contention, which appears quite identical with the one here, the court expressed itself as follows:

> "It cannot be doubted that the certification operated to transfer the legal title to the State, *Frasher vs. O'Connor,* 115 U. S. 102, nor that the contract between the State and appellant passed to him the equitable title, the legal title being retained by the State, simply as security for the unpaid part of the purchase money. The proposition, therefore, is that where there are outstanding two interests or titles, held by different parties, the real owner cannot proceed against either without joining the other; that only one action can be maintained to divest these parties of their separate

titles; and that to that action both adverse holders must be parties. The proposition is not sound. A court of equity has jurisdiction to divest either one of the adverse holders of his title, in a separate action. Doubtless the court has power, when a separate action is instituted against one, to require that the other party be brought into the suit, if it appears necessary to prevent wrong and injury to either party, and to thus fully determine the title in one action; but such right does not oust the court of jurisdiction of the separate action against either. It has jurisdiction of separate actions against each of the adverse holders, and there is no legal compulsion, as a matter of jurisdictional necessity, to the joinder of both parties as defendants in one action. There are special reasons why this rule should be recognized in this case. It may be that the Circuit Court would not have jurisdiction of an action against the State; that an action against a State, on behalf of the United States, can be maintainable only in this court; and that when brought in this court no other party than the State can be made defendant. We do not decide that these things are so, but suggest the difficulty which must have presented itself to the counsel for the government and which justifies a separate suit against the holder of the equitable title. The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged

> wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government. The jurisdiction of the Circuit Court over this bill was properly sustained."

The following observation made by the court in the Williams case, supra, in explanation of one of the bases for retaining jurisdiction, is of peculiar interest here. The court said:

> "It may be . . . that an action against a State on behalf of the United States can be maintainable only in this court; *and that when brought in this court no other party than a state can be made defendant.*"

It has since been established in several cases of the Supreme Court that the United States may not invoke the original jurisdiction of the court by joining the appellant packing companies and the respective states. That is made abundantly clear in the case of *California vs. Southern Pacific*, from which appellants have quoted at great length in their brief. The court expressly holds in that case that the United States Supreme Court does not have original jurisdiction of a suit between a state on the one side and citizens of another state and citizens of the same state on the other side. And the United States stands in the same position as a state in the application of the rule. See Hughes Federal Practice, Vol. 5, Sec. 3045, pp. 226, 227. The United States is regarded as a "sister state" and falls within

the same category as a state. See *United States vs. Minnesota,* (1926) 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539.

In the instant suit the United States is seeking injunctive relief against the packing companies, and they are, under any construction of the facts, the primary parties and the ones who have been engaged in the alleged trespassing. One is an Oregon corporation, the other a Washington corporation. It thus appears beyond permissible controversy that the United States District Court for the District of Oregon affords appellee the only tribunal before which it may seek relief from the injustice of such trespasses. That was one of the reasons why the Supreme Court in the Williams case, supra, retained jurisdiction, and held the state not to be an indispensable party.

A leading case upon the subject of inquiry is that of *United States vs. Lee,* 106 U. S. 196, 1 Sup. Ct. 240. In that case one Lee sued parties named Kaufman and Strong to recover a tract of real estate which was held by the defendants under orders from the Secretary of War of the United States. The Attorney General of the United States, without submitting the government to the jurisdiction of the court, filed a document setting up the fact that the property in question was held, occupied and possessed by the United States for governmental purposes and that the defendants were without personal interest, but were simply holding for and in behalf of the United States. It was contended that by reason of that fact the United States was an indispen-

sable party and that the action should be dismissed. The contention was declared unsound and judgment was given against the defendants as individuals. The principle involved was whether the United States, through the claim entered in the proceeding by the Attorney General claiming the property in behalf of the United States, ousted the court of jurisdiction to proceed with the parties before it. The court answered in the negative, stating:

> "That the proposition that, when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession can not be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it."

Apropos of this subject is the statement of Chief Justice Marshall, in the case of *United States vs. Peters,* 9 U. S. (5 Cranch) 115, 139, in which he declared in behalf of the court:

> "It certainly can never be alleged that a mere suggestion of title in a state to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title."

The above decision of this court is peculiarly applicable here, because, admittedly, the appellee could not have subjected either of the states to the process of the United States District Court for the District of Oregon. Nor would the said states have been proper parties because neither had been guilty of the trespasses com-

plained of. Nor was the government aware that either of the states was claiming title to the premises when the suit was filed, or at a later date.

This court recently had occasion to consider this question in its related aspects in the case of *Rose vs. Saunders, et al.; same vs. Calaveras Water Users Assn.,* 69 F. (2) 339 (Feb. 28, 1934). That was a suit in the nature of an action to quiet title by a plaintiff who claimed to be a tenant in common, owning an undivided one-half interest in all of the property described in the complaint. The properties consisted of certain water rights in a stream, four reservoirs, tunnels, ditches, conduits, a hydro-electric power plant, and a municipal distributing plant in the city of Angeles, county of Calaveras. It was alleged that the other undivided one-half interest in the property was owned by the Hobart Estate Company, a California corporation, *and that this co-owner was in peaceable possession and control of the property.* It was alleged that the defendants claimed title adversely to plaintiff and that the exact nature of the claim was unknown. The defendants moved to dismiss the bill on the ground that the Hobart Estate Company, the occupant of the premises and co-tenant, was an indispensable party plaintiff, consequently no diversity of citizenship existed between the necessary plaintiffs and the defendants; therefore, that the bill should be dismissed for non-joinder of an indispensable party, to-wit: the Hobart Estate Company. The District Court dismissed the bill and the Circuit Court of Appeals for the Ninth Circuit

reversed the decision of the District Court. We quote from the opinion, at page 340:

> "It is contended that he is a tenant in common with others, and ought not be permitted to sue in equity, without making his co-tenants parties to the suit. This objection does not affect the jurisdiction, but addresses itself to the policy of the court. . . . In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, *as, if such party be a resident of some other state,* ought not prevent a decree upon its merits. It would be a misapplication of the rule, to dismiss the plaintiff's bill, because he has not done that which the law will not enable him to do."

And at page 342:

> "We conclude that the appellant's co-tenant is not an indispensable party to this action where the only rights involved are her rights asserted against a third person who is made defendant in the action. The cause of action stated in the complaint is neither more nor less than a suit to quiet title which it is conceded may be brought without joining the co-tenant. The request for an injunction and the allegations of the complaint that the property in question is utilized by the co-tenants as a public utility do not change the character of the action."

In the case just cited this court quoted with approval the case of *Payne vs. Hook*, 7 Wall (74 U. S.) 425, 431; 19 L. Ed. 260. In that case it was held that one distributee of an estate need not join the other dis-

tributees in a suit by the first mentioned distributee against the administrator to obtain her distributive share in the estate and to cancel a receipt given by the plaintiff to the administrator. We quote from the Hook case and the opinion of this court in the Rose case, supra:

> "But it is said the proper parties for a decree are not before the court, as the bill shows there are other distributees besides the complainant. It is undoubtedly true that all persons materially interested in the subject matter of the suit should be made parties to it; but this rule, like all general rules being founded in convenience, will yield, whenever it is necessary that it should yield, in order to accomplish the ends of justice. It will yield, if the court is able to proceed to a decree, and do justice to the parties before it, without injury to absent persons, *equally interested in the litigation*, but who cannot *conveniently* be made parties to the suit."

The court's attention is next directed to the case of *Williams vs. Crabb,* 117 F. 193 (CCA 7, 1902); certiorari denied 187 U. S. 645, wherein it was held that one of two heirs could bring an action to set aside the will and deed executed by the testator and to recover his interest in the estate without joining the other heir, where to join her would oust the court's jurisdiction.

The case of *O'Connor vs. Slaker,* 22 F. (2) 147 (8th), bears precisely upon the question here before the court as to whether or not the states are indispensable parties to the suit. In this case it was contended that plaintiffs were entitled to the estate of one John

O'Connor, deceased, by virtue of a will bequeathing the same to one Charles O'Connor and, in the case of his death, to his heirs; that he died intestate and that they were his heirs at law. It was alleged that one Slaker, defendant and administrator de bonis non of the estate, was in possession of the property described in the petition. Among other things the prayer asked that the *title be quieted to the real estate as against the administrator and the State of Nebraska,* which said state was claiming the estate upon the ground that there was a failure of heirs of the devisee. The claim of the State of Nebraska was conceded. We quote from the opinion of the court, p. 153:

> "The State also takes the position that while it can not be made a party to this suit in the Federal Court, it is an indispensable party and hence the case can not proceed but should be dismissed, not only as to it but as to the other appelle. The result of sustaining such position would be to force appellants to try in the state court an issue which we hold is cognizable in equity in the federal court. Of course, it is equitable doctrine not to determine a suit without presence of the parties really affected by the decree. *Minnesota vs. Northren Securities Company,* 184 U. S. 199, 12 Supreme Court 308, 46 L. Ed. 499. It is also well settled that a state is not a citizen under the judiciary acts of the United States relating to suits by citizens of different states (citing cases). We are not convinced, however, that the State of Nebraska is an indispensable party to this action. It has no title whatever in the property claimed by appellants, *if they are in fact the heirs at law of John O'Connor. No title vests in the State unless there is failure of heirs. The question of heirship can be deter-*

mined in a federal court without the presence of the State as a party, and it is for the State to determine whether it will interplead and try that question there or risk whatever the effect might be of a decision of the said federal court on this question in an action between appellants and the other appellee. The dismissal of the case as to appellee, the State of Nebraska . . . was not erroneous."

(b)

Cases in support of Appellants' contention discussed.

The main case relied upon by appellants in support of the contention that the states, respectively, are indispensable parties, is that of *California vs. Southern Pacific Company,* 157 U. S. 229, 39 L. Ed. 383. The case does not appear to be in conflict with the cases heretofore discussed on this subject. That was a case in which the Supreme Court was exercising original jurisdiction and a decree of that court in exercising such an "exceptional" jurisdiction would have in effect been quite conclusively binding upon parties not before the court.

At page 257 of the opinion the court held:

"We have no hesitation in holding that *when an original cause is pending in this court, to be disposed of in the first instance* and in the exercise *of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined,* even though they might not be techni-

> cally bound in subsequent litigation in some other tribunal."

Thus the court explicitly based its ruling upon the sanctity and finality which would be accorded its own decree, and thereby, and by direct implication excepts the ruling from its application to other courts.

In subsequent citations of this case, the United States Supreme Court takes pains to point out that the holding is based upon the practical conclusiveness such a decree would have and expressly limits its ruling to its own exceptional jurisdiction. *Texas vs. Interstate Commerce Commission,* 258 U. S. 158, 163; *Penna. vs. W. Virginia,* 262 U. S. 553, 617.

Nor are the facts of that case correlative with those here at issue. Following the rendition of the decree in favor of appellee in the instant case, the respective states will stand in the identical positions occupied by them before the decree should be entered. None of the rights or remedies previously held by such states will be impinged upon or disparaged. It is not a correct statement of fact to say that the United States Supreme Court gives oracular effect to the decisions of courts of limited jurisdiction. Since the United States Supreme Court has repeatedly ruled upon the precise question here at issue, as we have already endeavored to show, it is submitted that the case is not helpful.

The case of *New Mexico vs. Lane, et al.,* 243 U. S. 52, 61 L. Ed. 588, cited at page 46 of appellants' brief, expresses the undoubted rule, but the rule fails of ap-

plication here. There the suit was one in effect against the United States and the United States had not consented to be sued. The plaintiff had laid hold of the wrong party. Obviously, if the suit in fact and in effect was one against the United States, as the court found, then the United States would be an indispensable party, and the suit was dismissed accordingly.

The case of *Chicago, M., St. P. & P. Railroad Company vs. Adams County,* 72 F. (2) 816, cited on page 40 of appellants' brief, is not helpful in considering this question. In that case certain railroad companies sought to invalidate tax assessments which had been made upon properties of plaintiffs, situate in various counties of the State of Washington. The counties as such were the sole defendants. The question presented by the case was whether the county treasurers of the defendant counties were indispensable parties to the suit. In deciding the question the court first stated the universally accepted general definition of "indispensable parties" without any reference to the universally recognized exceptions thereto. The court thereupon proceeded to an analysis of the statutes of the State of Washington to determine the part played by the county treasurers in the collection and assessment of taxes, thus to determine whether or not such county treasurers were indispensable parties. We quote from page 820 of the decision:

> "It will be seen from the foregoing that the active agents in collecting taxes are the boards of county commissioners and the county treasurers.

Furthermore, the county treasurers are repeatedly and specifically designated, by the Washington statutes, as *the collectors of state, county, and other taxes.* Thus, section 83 of the chapter above referred to provides: 'The county treasurer shall be the receiver and collector of all taxes extended upon the tax rolls of the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county.'

"Again, in section 84 we find '* * * And from and after the taking effect of this act the county treasurer shall be the sole collector of all delinquent taxes and all other taxes due and collectible on the tax lists of the county.'

"Similar provisions, emphasizing the treasurer's *tax-collecting* duties with even greater particularity, are to be found in Remington's Compiled Statutes of Washington, 1922. Thus, the county treasurer is exofficio treasurer for the pest districts in his county, and the taxes for such districts are to 'be collected and accounted for the same as other taxes are.' Section 2805. The county treasurers shall collect the taxes for diking and drainage districts (section 4382); school districts (section 4867); irrigation districts (section 7453); port districts (section 9693); public waterway districts (section 9811); state, county, school, bridge, road, municipal, and other taxes (section 11252); taxes for cities of first class (section 11321) and cities of the second, third, and fourth classes (sections 11330 and 11334); townships (section 11454); and road districts (section 11482).

"Such an impressive array of statutes clearly indicates that the Legislature of Washington intended that the county treasurers should be indissolubly linked with the tax-collecting machinery

> of the state. That being so, we are convinced that in a suit such as this, in which tax collecting is sought to be restrained, the county treasurers are indispensable parties."

The case rests upon the same foundation of reasoning as that of *New Mexico vs. Lane* and expresses the undoubted law applicable in such cases.

Skeen vs. Lynch, 48 F. (2) 1044, is cited at page 47 of appellants' brief in support of the proposition that the State of Washington is an indispensable party to this suit. The facts of that case are discussed at pages 47 and 48 of appellants' brief. The court could not do otherwise in the Skeen case than to hold that the United States was an indispensable party. We quote from the opinion, at page 1046:

> "We accept the assumed fact as irrefutable. The legislative history of the Stockraising Homestead Act when it was reported for passage including the discussion that followed relevant to this subject leave us no room to doubt that it was the purpose of Congress in the use of the phrase 'all coal and other minerals' to segregate the two estates, the surface for stockraising and agricultural purpose from the mineral estate, and to grant the former to entrymen and to reserve all of the latter to the United States. In that respect the case is well within the rule announced in *Work vs. Braffet*, 276 U. S. 560, 566, 48 S. Ct. 363, 72 L. Ed. 700; * * *
>
> "Appellant relies on the rule that general words may be restrained by particular words—ejusem generis—to sustain the first count. The functions and limitations of that rule are stated in *Danciger vs. Cooley*, 248 U. S. 319, 326, 39 S.

Ct. 119, 63 L. Ed. 266; *Cutler vs. Kouns,* 110 U. S. 720, 728, 4 S. Ct. 274, 28 L. Ed. 305; *Mason vs. United States,* 260 U. S. 545, 554, 43 S. Ct. 200, 67 L. Ed. 396; and *Webber vs. Chicago,* 148 Ill. 313, 36 N. E. 70. But again, immediately following the mineral reservation clause in said act (section 9) is this: 'The coal and other mineral deposits in such lands shall be subject to disposal by the United Sattes in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal.' We can conceive of no reason or purpose for including in that sentence the words 'and other mineral' and 'and mineral' had it been the intention to reserve only coal and the like,—noscitur a sociis. Had that been the purpose the sentence would have appropriately read: The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal land laws in force at the time of such disposal. In our opinion all mineral in the 640 acres was reserved to the United States."

After thus ruling affirmatively that the oil and gas properties in dispute were the property of the United States, the court was bound to hold the United States to be an indispensable party. Certainly the court, upon deciding the fact to be that the United States was the owner, would not proceed to an adjudication respecting the property in the absence of such actual owner. The case stands upon the same logical base as *New Mexico vs. Lane,* supra.

If this court should decide upon the record before it that the disputed area of sands is situate within the State of Washington and that it is the property of said state, then the State of Washington would admittedly

be an indispensable pary. Without such a preliminary holding, *Skeen vs. Lynch* would not serve as authority for the proposition that the State of Washington is an indispensable party.

The case of *United States vs. Ladley,* 51 F. (2) 756, is discussed in appellants' brief, beginning at page 52. The case is not authority for the proposition that the states respectively are indispensable parties. In that case the court answered two questions. We quote from the opinion, page 756:

> "The only questions to be determined at this time are (1) whether the state should be permitted to intervene, and (2) if so, would the court lose jurisdiction of the case after the state becomes a party."

We are not at this time concerned with the second question. That is considered and discussed, beginning at page 43 of this brief.

In passing upon the first question—that is, whether the state should be permitted to intervene—the court construed Equity Rule No. 37, which relates to the circumstances under which intervention will be permitted, and ruled that the State of Idaho was a proper party and held:

> "*The court may under that rule* (37) *in its discretion proceed without making such persons parties* and the decree will not prejudice the rights of the absent parties."

The court simply exercised a discretion afforded by Rule 37 and expressly excepted its ruling from the ap-

plication of Rule 39, which applies to the subject of indispensable parties. The case is cited in the brief of appellants for the proposition that the State of Idaho was in that case held to be an indispensable party. It is submitted that it was not so held and that the court expressly limited its ruling to the application of Rule 37 on the subject of intervention.

The Ladley case has been discussed in some detail in its application to the questions concerning the attempt made by the Attorneys General to intervene.

ARGUMENT

Point V

The shift in the North Ship Channel, between the years 1929 *and* 1934, *did not constitute an avulsion.*

Numerous maps of Sand Island and vicinity, comprising Plaintiff's Exhibit No. 1, show that the North Ship Channel is alive and active and that it has maintained approximately the same general location since the year 1880. The Supreme Court recognized in its decisions in *Washington vs. Oregon,* 211 U. S. 127, and *Washington vs. Oregon,* 214 U. S. 205, 215, the vagaries of movement peculiar to Sand Island and sand bodies which are predisposed to form in the estuary of the Columbia. The Court prescribes two distinct indices or formulae for location of the line of the channel:

(1) The line may be located by tracing the thread of the channel as the same has varied by the processes of accretion;

(2) The line may be located by determining the thread of the channel as the same has varied by reason of changes wrought through the construction of jetties out into the river.

In this connection the Court uses the following language (214 U. S. 215):

> "So whatever changes have come in the North Ship Channel, and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion or, perhaps, also of late years from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel."

It is submitted that three theories may be advanced to account for the variation in the line of the channel; i. e., accretion, changes wrought through the construction of the dikes, and avulsion.

(1) As to the matter of accretion, it is urged that the change in the line of the channel was brought about through the normal processes of accretion. Beginning with the year 1928, down to and including the year 1934 (see maps for these years — Plaintiff's Exhibit No. 1), it will be noted that the North Ship Channel began to diminish in width and depth until the final union of the sands was consummated in 1934. This was brought about apparently by the gradual deposit of particles of sand upon the banks of the channel through the flux of the tides and the action of the storms. It was a gradual and imperceptible process from month

to month, but noticeable as to the quantum of change from year to year. This, we submit, is accretion.

(2) If the change of the channel in the manner above detailed was wrought by the jetty construction, then the change in the line of the channel was expressly covered by the ruling of the court.

(3) By no possible stretch of definition can the change in the channel's course over a period of approximately six full years be termed an "avulsion."

ARGUMENT

Point VI

THE UNITED STATES IS THE OWNER IN FEE SIMPLE OF SAND ISLAND AND THE TIDE-FLATS WHICH FORM ITS SOUTHERN SHORES

(a)

General Statement of Contentions Advanced by Appellants and Respondents in Support of Their Respective Claims.

The appellants support their claim to right of occupancy of the premises upon the theory that they hold a lease of the same from the State of Washington, that the properties are situate within said State, and that said State is the owner thereof. The claim is predicated upon two fundamental assumptions: (1) That the properties here in dispute are identifiable as a part of that

body of land known as Peacock Spit, which is admittedly within the State of Washington, and (2) That this body maintained its identity and by a process of accretion grew northerly and easterly to form a juncture with Sand Island.

Appellee contends that this body of sand lying along the southerly shores of Sand Island is an indivisible part of Sand Island and the property of the United States. This claim of ownership is predicated upon three distinct theories, to-wit: (1) That the area of sands is not identifiable as a part of Peacock Spit, (2) That the same has become attached to Sand Island by a slow and imperceptible process of accretion and reliction, thereby to form a part of Sand Island, which is admittedly within the the State of Oregon, and (3) That by virtue of its grant from the State of Oregon appellee's title extends to the low water mark of Sand Island, which line extends along the southerly edge of the sands here in dispute.

(b)

The Question Poised

It is by all admitted that Sand Island is a stable and permanent body of land which has maintained its present approximate location since about the year 1885. Its high water mark has not been substantially changed since the year 1900, when the body of sands known as Republic Spit formed the union with the Island under circumstances quite identical with those now before

the court. It is maintained by the United States as a military reservation and the maps show it to be strategically located in the estuary of the Columbia River for defense of the channel across the bar leading into the Pacific Ocean. It is unfortified at the present time. The Island has been used by the United States as a base for dike construction to facilitate the maintenance of a proper channel in the Columbia River. Its shores have been used for generations as fishing sites, and the record discloses that the United States has collected rentals of approximately $600,000 for the use of the fishing sites situate along its southerly shores. Annual rentals of as high as $46,000 have been collected from appellants herein. The property is immensely valuable in both its national defense and commercial aspects.

The permanence of Sand Island and its general physical attributes stand in conspicuous contrast to the area of sands over which this dispute hinges. No controversy exists between the parties with respect to the character of said body of sands prior to its union with Sand Island. It first began its meandering about in the estuary of the Columbia River during the years 1929 and 1930. The maps only partially depict its course between the years 1930 and 1934. During that period they were built up and torn down intermittently and constantly, with new bars forming overnight and old bars being washed out. In the course of a six-months period the channels, cutting and shifting easterly and westerly across the area, have been known to change as much as a thousand feet. Single storms would effect

a change and shifting in the channel or channels and of the bars of several hundred feet. But in the face of this unremitting assault of the waves, currents, winds and tides, the body of sands did maintain something of an entity. Between 1932 and 1934 it is observed that the body diminished in area between 40% and 50%, and at that time the union was formed with Sand Island.

With the properties thus projected by an undisputed record, this court is called upon to say whether a permanent and fixed island may for all practical purposes be destroyed in its utility and value by the appendage of a small, narrow, fleeting and transient body of sands which has been thrown up and against its riparian shores. The fishing sites upon Sand Island are admittedly all located upon and within the area here in dispute, and upon favorable acceptance of appellants' contention, Sand Island, both as an accessory to the national defense and in its commercial aspects, would be quite completely destroyed.

Before going into the law, which we shall endeavor to show is well established in respect to the question, we suggest at the outset that the contention made by appellants is a shocking one. If such a rule should be established, property rights bordering upon the estuary of the Columbia River would be immediately unsettled. The unquestioned policy of the law towards stabilization of titles to real estate would be defeated if such a fickle and fleeting body, traveling willy nilly in the stream, should be permitted to cut off and destroy

permanent and vested property interests.

(c)

Discussion of Cases Cited by Appellants

The Oregon cases cited in the brief of appellants establish several well-recognized principles which we readily concede. There is no contention over the ownership by the State of Oregon of the bed of the stream. It is also true that the statutes of Oregon and the decisions of the Oregon courts and those of Washington have recognized tide and overflow flats as having certain attributes of property and that the same are under stated circumstances capable of alienation. Such tide flats may receive the benefit of accretion under stated circumstances. Recognition has been paid such bodies of sands where the same have had a substantial measure of permanency and where their essential identity has been preserved. But in the Oregon cases mentioned in appellants' brief establishing the above propositions, nothing to parallel our present question may be found save in the case of *State vs. Imlah,* wherein a question similar in many respects to the one here before the court was determined adversely to appellants' contention. The case will be discussed at some length herein upon an affirmative treatment of the subject.

Tide flats or sand bars are not "islands" and are not accorded legal significance as such. Appellants have assumed that because tide flats of measureable permanence have been recognized for some purposes as

having certain incidents of property and of ownership; they have therefore assumed the dignity of "islands." The decisions, as the lower court has construed them and as we now contend, have not so held. The courts have recognized such properties for what they are and nothing more. They have been given a specialized significance; they have been styled at times as "islands" but then only in the colloquial sense. We proceed to an analysis of the cases cited by appellants to establish the proposition which we concede — that is, that the owner of an island is entitled to lands added thereto by accretion to the same extent as the owner of land on the shore of the mainland.

Holman vs. Hodges is apparently the leading case relied upon (appellants' brief, pp. 103, et seq.). In that case the court took great pains to define the permanent character of the island there involved, and described in some detail the various incidents which combined to make it an "island" within the accepted definition. We quote from the decision:

> "The plaintiffs have been owners of Lots Three and Four, bordering the Missouri River, since 1862. A bar began to form opposite these, near the middle of the stream, in 1857. The following year a steamboat ran aground on the bar and for several years afterwards boats were compelled to avoid it by following the current on either side. As early as 1861, according to one of the plaintiffs, it was a half mile wide and has been added to until it is now two or three miles long. By 1870 the northern part was overgrown with willows, and, though the main current of the river had gradually

changed to the west of the bar or island, that part on the east was still fifteen or twenty rods wide, with a distinct current. Since then, willow and cottonwood trees have sprung up on the bar. A small part was cultivated in 1878 and it has been occupied for agricultural purposes since 1886. During all these years alluvial deposits have been added to the north, south and west. In 1870 alluvial deposits began to form on plaintiffs' lots and this has been going on ever since. The water, at ordinary stage, continued to flow between plaintiffs' land and the island until about 1887, and it has run through a well-defined channel during the spring and * * * of the river up to the present time. Without setting out the evidence in detail, it is enough to say that the formation of the bar, or island, has been entirely distinct from any accretion to the shore. It arose near the middle of the river, though probably east of the thread of the then main current, without any connection with the Iowa shore, and has been gradually added to by accretion or reliction until the island *of the proportions mentioned* was formed."

The court there was dealing definitely with an island of substantial and permanent character. The island in that case did not go wandering off in the channel of the stream. It was built up under a normal process of accretion and maintained a permanent base. The ruling is clearly sound, considered in the light of the particular facts.

The same situation is found in the case of *Bouchard vs Abramson*, cited in appellants' brief at p. 82, 118 Pac. 233, 160 Cal. 792. In that case the island had existed in the same location since 1866, and was used for

growing crops, grazing cattle, had fences and other permanent fixtures incidental to such operations. Title had long since been recognized as having vested in its claimants. It was an island within the accepted definition of the term, and correlates with the case of *Holman vs. Hodges,* supra.

The case of *Fowler vs. Wood,* mentioned at p. 107 of appellants' brief, is of similar character. In that case the island involved embraced an area of 274.7 acres. It had been dealt with by purchase and descent from the year 1866, and the court noted that twenty-five different parties claimed to be tenants in common of the tract. It was a permanent body of land lying between the sources of the Missouri and Kansas rivers. It was an island within the accepted definition of the term.

The case of *People vs. Warner,* cited by appellants at p. 82 of the brief, is to the same effect. In that case, as in the others, the court referred to an island of permanent and tangible identity and not to a primitive, floating and temperamental formation of the type we are here considering.

The cases above noted are not, we submit, even remotely analagous to the facts of the situation now before the court.

(d)

Affirmative presentation of the rule applicable to the facts

It is thus seen that in all the cases cited by appellants the accretions referred to applied to islands of a substantial and permanent character, where property rights in favor of individuals had long since vested. Here, as the evidence has disclosed, our problem concerns bodies of alluvial deposits which were in a constant state of flux and which were scarcely identifiable from month to month, particularly in the winter time, when storms occurring with frequency would cause drastic changes in the bars and channels.

When confronted with this problem, the courts have used a variety of legal concepts and have adopted divergent forms of reasoning, but always, so far as our research has disclosed, to arrive at a uniform result. The rule, as we shall soon show, traces its roots deep into the common law. It has been formulated in the cases through a variety of attempted encroachments upon the rights of riparian owners of navigable streams. Without exception, so far as we are able to know, the rights of the littoral proprietor have been held inviolable. Whether the obstruction be an alluvial deposit or sand bar; whether it be an accretion extending laterally to the shore line; whether it be a rock shoal in the stream adjacent to the shore or a number of other obstructions, courts and litigants have invariably bowed to the superior claims of the littoral proprietor.

Before going into the decisions of the Oregon courts controlling the question, reference will first be made to the decisions of courts of other jurisdictions,

which serve to illustrate the applications which have been made of the principle here involved.

The case of *McBride vs. Steinweden,* 72 Kans. 508, 83 Pac. 822 (1906), is the one usually cited because of its definition of an island as it is known to the law. That was a case in which a so-called "island," which had formed in the bed of the Mississippi River, had subsequently become attached to the shore of a riparian proprietor because of a shifting in the river channel. The littoral owner claimed the island or bar as an accretion, and the owner's contention was upheld. The definition of an island is contained at p. 824 of the decision, from which we quote:

> "It is complained of the instructions and especially as to the one which defined an island. Among other things, the Court said:
>
> " 'It may be stated by way of definition that to constitute an island in a river the same must be of a permanent character, not merely surrounded by water when the river is high, but permanently surrounded by a channel of the river and not a sand bar subject to overflow by rise in the river and connected with the land when the water is low.' In the same connection, the jury were told that in considering whether an island in fact existed, or whether the land in controversy was accreted to plaintiff's land, it might consider the character and extent of the claimed accretion, the character of timber growth, the relative size and permanence of channels, if any, around the claimed island, as compared with the size of the stream, the topography of the land in controversy, the character of the soil, the growth, if any, of trees or timber, the testimony of the witnesses, and in fact

all the circumstances as developed by the testimony. Whether the formation in the river was a sand bar or an island was a question of fact and it was fairly presented to the jury. It would depend upon the stability of the soil and the size and permanence of the channels around it. *Railroad v. Shumeier*, 7 Wall (U. S. 286, 19 L. Ed. 74); *Shoemaker vs. Hatch*, 13 Nev. 261; Gould on Waters, (3d Ed.) par. 166.

"As the Court told the jury, account should be taken of the conditions named and also of a variety of circumstances as to the physical features of the formation; the growth upon it, and whether the water supposed to separate it from the shoreland was there in times of high water only, or during the ordinary stage of water in the river."

In the above case the court unequivocally recognized that an alluvial deposit which had not attained the eminence of an island could become attached to the shore lands as an accretion.

Another case is that of *Cyrus Webber vs. J. A. Axtell*, 94 Minn. 375, 102 N. W. 915. That case involved an inland body of water which was a navigable lake, and a shore owner acquired from the United States four meandered lots. Fifteen rods from these lots, between the same and the center of the lake, was an "island," (quotations ours) which was not surveyed or reserved to the Government when the patent was issued. Several years afterwards other parties caused the island to be surveyed and obtained a patent therefor from the United States. A controversy arose between the claimants under the two patents for possession of the property, which was litigated in this suit.

At the time it was commenced accretions had established a sand bar between the so-called island and the property of the shore owner. It was held that the riparian rights of the first patentee vested in him a contingent interest in all relictions and accretions by change of water line, which included the island in question, at the date of the patent from the Government. It was further held that the first patentee could not be deprived by the later patentee of such vested interest.

The Court's attention is further directed to the case of *King vs. Young,* 76 Maine 76, 49 A. Reps. 596. The controversy in this case arose over the ownership of a mussel bed situate in a navigable stream. Contention was made that the mussel bed was an island and that its extension by accretion to the shore of the mainland did not constitute the mussel bed an accretion to the shore or mainland. In enunciating the rule, the court held:

> "He then contends that the mussel bed is an island if it first commences to form at a distance from the shore and there first shows itself above the surface of the water at ebb tide, leaving sufficient water between it and the shore for boats to pass, although by its continued growth it subsequently extends to and connects with the shore so as to leave no water between it and the shore at ebb tide. In this we think he is wrong. We think a mussel bed over which the water ebbs and flows at ebb tide can not properly be called an island. We think such formations constitute what are called flats; and by virtue of the ordinance 1641-7 belong to the owner of the adjoining land, if within one hundred rods of high water mark or so con-

nected with the shore that no water flows between them and the shore when the tide is out."

The case of *Mulry vs. Norton,* 100 N. U. 424, 3 N. E. 581, a leading case and one frequently cited, is authority for the proposition that the owner in fee of the "bed of the river" or other submerged lands is the owner of any bar, island or dry lands which subsequently may be formed thereon. As we show below, the appellee is the owner of the "bed of the river" on which the deposits here involved were formed. *Mulry vs. Norton* is also authority for the proposition that the right of accretion to an island in the river can not be extended lengthwise of the river in a manner to exclude riparian proprietors above and below such island from access to the river.

Attention is also directed to the case of *Waring vs. Stetcomb,* (Md. 1923) 119 Atl. 336. In that case the lands of the plaintiff and the defendant, both fronting on Chesapeake Bay, were separated by a small stream entering the Bay. Due to a slow shift of the stream into the plainitff's land a bar was gradually added to the defendant's land. This bar extended across the front of the plaintiff's property. In an action to recover this land it was held that the land so formed belonged to the plaintiff, despite the fact that it was separated from the plaintiff's main body of land by the boundary stream, since to hold otherwise would deprive the plaintiff of valuable riparian rights on the Bay.

(e)

The properties here in dispute are the properties of the United States, by virtue of its grant from the State of Oregon

The Act granting Sand Island to the United States provides as follows:

> "AN ACT to grant to the United States all right and interest of the State of Oregon to certain tide lands herein mentioned.
>
> "Section 1. There is hereby granted to the United States, all right and interest of the State of Oregon, in and to the land in front of Fort Stevens, and Point Adams, situate in this state, and subject to overflow, between high and low tide, and also to Sand Island, situate at the mouth of the Columbia River in this State; the said island being subject to overflow between high and low tide." (Tr. p. 6.)

The character of a grant of tidelands is defined in the case of *Fellman vs. Tidewater Mill Co.*, 78 Ore. 1; 152 Pac. 268. We quote from the opinion of Mr. Justice Burnett:

> "In the first place, as regards the tide-lands, the deeds conveyed to the grantor of plaintiffs all the tide-land in front of the lots mentioned. This extended the holdings under those deeds to low-water mark, wherever the same might be then or afterward. Applying this principle, Mr. Justice Eakin, in *Grant vs. Oregon Navigation Co.*, 49 *Or.* 324 (90 Pac. 179, 1099), as quoted by Mr. Justice Bean in *Pacific Elevator Co. vs. Portland*, 65 Or. 349, 399 (133 Pac. 72, 82, 46 L. R. A. (N.S) 363), said:

"'By the legislative acts of 1872 * * * and 1874 * * * the upland owner was given the preference right to purchase the tide-land, and upon such purchase, if not already vested in another under Section 4042, B. & C. Comp., he thereby acquired also the exclusive wharfage right to deep water, and also all accretions to his tide-land and the right to fill up the shallows or flats, so long as he does not impede navigation or interfere with commerce over the same.'

"The rule is that the purchaser of tide-land takes to the low-water mark, that *afterward he is entitled to follow that line to the utmost of its recession, and that he aquires title to the accretions* which gradually form upon his original grant."

It is established in the law of the State of Oregon and confirmed by appellants at p. 80 of their brief, that title to the *beds and banks of navigable waters* carries with it title to all *tide lands, tide flats and like formations. Taylor Sands Fishing Co. vs. Benson,* 56 Ore. 157, 108 Pac. 126; *Van Dusen Investment Co. vs. Western Fishing Co.,* 63 Ore. 7, 124 Pac. 677, 126 Pac. 604.

The Supreme Court ruled in the case of *Armstrong vs. Pincas,* 81 Ore. 156, 158 Pac. 662, that land below ordinary high-water mark is properly styled the "bed of the river." We quote from the decision, pp. 159 and 160:

"It may be said that below ordinary high-water mark land is deprived of its usefulness as land by the action of the water remaining upon it so permanently, and becomes what we all know as the bed of the river; *Paine Lbr. Co. vs. U. S.,* (C. C.)

> 55, Fed. 854, 865; *Sun Dial Ranch vs. May Land Co.*, 61 Or. 205, 119 Pac. 758. The beach or shore of our rivers is the actual as well as the nominal bed of the river. Hoch, Rivers, Sec. 7. All is river or river's bed which is contained between the two banks and the high-water line on them, and all is bank or land which embraces the waters in their ordinary full tide. Land in New Orleans, called the Batture, 17 Am. St. Papers, 91."

The grant of the State of Oregon to the United States expressly contained a grant of Sand Island to low-water mark, and thereby conveyed to the United States a portion of the bed of the river, as that term has been defined, supra, and coincidentally the United States became entitled, under the rule of the Taylor Sands and VanDusen cases just cited, to all tide lands, tide flats, and like formations which might form thereon.

The question of interpreting the meaning of low-water mark in its relation to islands or alluvial deposits forming opposite the riparian shores of such a grantee came squarely before the Oregon Supreme Court in the case of *State vs. Imlah*, 135 Ore. 66, 294 Pac. 1046 (1931). In that case the State had granted the fee to Imlah to low-water mark. An island of some sixteen acres formed in the bed of the Willamette River (a navigable stream) opposite Imlah's holding, with navigable channels on either side thereof. Gradually the channel between Imlah's shore and the island shoaled by accretion extending from the shore to the island. The State of Oregon made strenuous contention that

since the island had formed in the bed of the stream the same belonged to the State of Oregon and that the attachment of said island to the riparian shores of the State's grantee did not defeat such ownership. Said Chief Justice Rand in the opinion:

> "The State's principal contention is that the small island first appearing in 1882, or shortly thereafter, somewhere west of the center of the river continued to exist as an island and to become enlarged by the gradual and imperceptible deposit of sand and gravel upon its outer edges, thereby filling up the channel between it and the west bank and extending the island to the mainland, and that the alluvia thus deposited between the two constituted an accretion to the island and not to the mainland as contended for by the defendants and as held by the court below in the decree appealed from. If this contention is sustained by the evidence, the rule unquestionably is that *where an island arise in a stream, the title to the bed of which is in the state, it does not belong to the owner of either shore, but if it is formed upon a portion of the bed which belongs to a riparian owner it becomes his property.* 1 Farnham on Water Rights (1904 Ed.) p. 276 and authorities there cited. . . . Under said grant of the lands lying between high and low-water marks of the Willamette River by the State defendant's lands at all stages of the river were in actual contact with the water and the owners thereof were riparian owners and became entitled to all the rights and privileges of such ownership. This included the right to all accretions which thereafter should become annexed to the shore or river bank upon their respective premises. *There is no evidence whatever by which the low water mark of the river at the time of said grant can be fixed. At present all the premises in*

controversy are attached to the shore or bank of the river and uncovered during mean low water.

"Under these circumstances we think that the rule 'Once a riparian owner always a riparian owner' should be applied. 1 Farnham on Waters and Water Rights, p. 326. As said by Mr. Justice McBride speaking for this court in *Hanson vs. Thornton*, 91 Orc. 585, 179 Pac. 494: 'One who purchases land upon a lake or water course usually considers the right of access to such waters as an element of value in such purchase. When we speak of riparian rights we are not considering a mere shadowy privilege but a substantial property right, the right of access to and a usufruct in the water. *To say that the owner of such a right may without his consent be deprived of it by the state or the general government, permitting some other person to obtain title to the accretion formed by an impounding or diversion of part of the waters that previously washed the shore of his land does not appeal to our sense of justice and we do not believe that the authorities generally support such a doctrine!*"

See also *Shively vs. Bowlby,* affirming the doctrine of *State vs. Imlah,* supra, wherein the court said (152 U. S. 1, 38, 39):

"The question in controversy was whether the plaintiff's patent was limited by the main shore, or extended to the outside of the island. The Supreme Court of Minnesota held that, by the law of Minnesota, land bounded by a navigable river extended to low water mark, *at least, if not to the thread of the river;* and that the plaintiff's title therefore extended to the water's edge at low water mark and included the island, and gave judgment for the plainitff. 10 Minnesota, 82. This court affirmed the judgment, saying: 'Express decision of the

> Supreme Court of the State was, that the river, in this case, and not the meander line, is the west boundary of the lot, and in that conclusion we entirely concur." . . . 7 Wall. 286, 287.

See also *Strandholm vs. Barbey,* 145 Ore. 427, 439; 26 Pac. (2) 46, wherein the contention was made by the defendant, Barbey, in that case—who is the same Barbey now before the court—that he was the lessee of the United States of America, owner of Sand Island, and that as such he possessed a sufficient stake in the island to confer upon him the rights which riparian owners possessed to wharf out *from the shore line to navigable waters.*

It would thus appear that the terms of the Act granting the properties to the United States were broad. The grant was not only of Sand Island, but included "all right and interest of the State of Oregon in and to the land in front of Fort Stevens and Point Adams situate in this state and subject to overflow between high and low tide, etc." Mindful of the purpose for which the grant was made, a construction would not be unwarranted that title was taken to the thread of the stream or to navigable waters under the rule enunciated in the cases above cited.

The former holding of this court in the case of *Columbia River Packers Association vs. United States,* 29 F. (2) 91, would seem to effect the same result. We quote from the opinion:

> "This suit was instituted by the United States and its lessee, against the state land board of the

state of Oregon and its lessee, to establish the right and title of the United States to Sand Island, at the mouth of the Columbia river, *and to the tide and shore lands adjacent thereto. From a decree in favor of the plaintiffs, the defendants have appealed.*

"*Sand Island is within the limits of the state of Oregon, and the adjacent tide and shore lands, up to high-water mark, originally belonged to that state. Washington v. Oregon*, 211 U. S. 127, 29 S. Ct. 47, 53 L. Ed. 118; *Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed. 331.

* * * * *

"After the lapse of nearly 70 years it would seem that a grant such as was made by the state of Oregon in this case should not be open to further controversy, especially in view of the fact that the grantee has asserted and exercised dominion over the granted premises for upwards of 25 years. Nevertheless, the state of Oregon now contends, first, that the grant was for military or naval purposes only; and, second, that the grant has never been accepted by Congress. But the grant itself is absolute in form, wihtout limitation or condition, and it would violate every known rule of statutory construction to ingraft upon it now any such limitation or condition as that contended for by the appellees, *especially in view of the construction the parties themselves have placed upon the grant for so long a period.*"

Thus it is seen that the courts have been very zealous in their protection of the rights of littoral owners on navigable streams. Nor have the Oregon courts wavered in affording such protection. The case of *State vs. Imlah*, supra, has already been considered. In the case of *Moore vs. Willamette Transportation Co.*, 7

Ore. 359, the rule was established that a reef of rocks on the margin of a navigable river belongs to the riparian owner, though there is in ordinary stages of water in the river a channel between this reef and the shore.

Other interesting cases containing exposition of the rule are: *Coquille Mill & Mercantile Co. vs. Johnson,* 52 Ore. 547, 555; 98 Pac. 132; *Weems Steamboat Co. vs. Peoples Steamboat Co.,* 214 U. S. 345, 53 L. Ed. 1028.

We conclude this phase of the discussion by directing attention to the case of *Cook vs. Dabney,* 70 Ore. 529, 139 Pac. 721. That was a suit brought by riparian owners to cancel a deed issued by the State Land Board, purporting to convey a sand bar or island, so-called, in the channel westerly of Swan Island in the Willamette River, a navigable stream, between low water mark and the ship channel. The plaintiffs in the suit insisted that they had a right of access to navigable water, which was in the nature of a franchise or incorporeal hereditament, and annexed to the upland ownership; that the State of Oregon held title to the bed of the river in trust; that it had no power to sell the beds of navigable streams; that the conveyance of the shoal or sand bar to private owners impaired the rights of plaintiffs to wharf out to the navigable ship channel and constituted a cloud upon their title and for that reason should be cancelled.

The evidence showed that the so-called "island" or sand bar was continually changing by the action of

the waters. The court sustained the claim of plaintiff and cancelled the deed formerly given by the State and stated, among other things:

> "The right of access to navigable water abutting upon riparian lands is a valuable appurtenance to such lands, and equity will in good reason give relief against an instrument designed to prejudice the enjoyment of such appurtenances. Such is the doctrine laid down in *Sengstacken vs. McCormick*, 46 Ore. 171, 79 Pac. 412. . . .
>
> "It would seriously unsettle property rights of riparian owners and work great harm to navigation *if it were permitted that the moment low water should disclose a sand bar, that is liable to be carried out by the next flood, one might apply to the State and get a deed in fee simple for such a place and be authoribed to use it as a basis for exactions against the upland owners.*"

CONCLUSION

Not until the appellee cancelled its lease with the appellant packing companies in 1932 was there a suggestion of dissent over the ownership of Sand Island and the sand bars appurtenant thereto. When the Government failed to again offer the fishing sites for lease for the fishing season of 1932 and subsequent years, it was thereupon concluded that the sands adjacent to the Island should be called Peacock Spit and under such a claim possession was taken and the fishing went forward.

Such occupation continued until the Government offered the sites for lease in 1934 and the bid of plain-

tiffs was tendered to the Government, thereby discountenancing the so-called lease of the premises from the State of Washington. But the United States did not accept any bids tendered at that time and the appellants again reverted to the claim under the assumed lease from the State of Washington. This claim was continued until the State of Washington late in the year 1934 declared unlawful the use of drag seines within the State.

With other sources of claim for occupancy of the premises cut off, we next find the appellants applying to the State of Oregon for a lease of the premises under a new theory, to-wit: that the property rightfully belonged to the State of Oregon. Upon this application of appellants a hearing was held, but no action was taken by the State. This is all shown by an uncontroverted record.

The ruthlessness of such action is made to stand out in some relief when it is recalled that in the answer of appellants it was alleged and sworn to that:

> "The premises leased by the State of Washington to defendant Baker's Bay Fish Company as aforesaid, being the identical premises upon which the defendants have carried on the fishing operations described in the original complaint and in the amended complaint herein, are not and never were a part of Sand Island and are not and never were within the State of Oregon.
>
> "*At no time since Oregon was admitted to the Union has it claimed that said premises or any part thereof were within the State of Oregon or*

exercised or claimed the right to exercise any jurisdiction over it." (Tr. pp. 21, 22.)

It might appear as a bit strange to the court that after the case of appellee had been filed for almost a year, the Attorneys General of the two States should within the same week take it into their heads to rush into the court in a last moment attempt to intervene. Perhaps it was by coincidence that the officers of the States decided almost within the hour, so to speak, to rush into the contest. Their interests were diametrically conflicting. We do not suggest that the States acted in bad faith, but the reason for their concerted action is matter for speculation. It is significant that the attempts at intervention thus made have been capitalized by appellants in an effort to prevent consideration of the case upon its merits.

No relief was asked as against either of the States. Neither can be affected by the decree of the court. Neither can be hurt by the decree, because it is not contended that the alleged lease of the State of Washington is practically operative at this time or that it has been operative since drag seining was declared illegal in that state; and a decree of this court will not purport to bind the State of Oregon in any connection.

The suggestion that the States will be without a remedy in the event the within decree is sustained can hardly be considered correct in the face of the thousands of cases now pending throughout the country, in which the United States is being sued with its consent

having been given. In any event, the suggestion is not a proper one. The Supreme Court expressed the thought precisely when it opined, in the case of *United States vs. Lee*, 106 U. S. 241, quoting from the decision of *Gibbons vs. United States*, 8 Wall. 269,:

> *"The supposition that the Government will not pay its debts or will not do justice is not to be indulged."*

The appellee has chosen the only tribunal available to litigate its claim against appellants. As we have shown, it could not have joined the States and the defendant companies to invoke the original jurisdiction of the Supreme Court of the United States. Without a decree upon the merits sustaining the trial court, appellee stands without recourse to protect its properties against the continued maraudings of the appellant companies.

It is respectfully submitted that the decree of the learned and able trial court should be sustained.

Respectfully submitted,

CARL C. DONAUGH,
United States Attorney for
the District of Oregon.

EDWIN D. HICKS,
Assistant United States Attorney
for the District of Oregon.

No. 8166

United States

Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC EMPLOYERS INSURANCE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8166

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Petitioner:

F. BRITTON McCONNELL, Esq.,
JOSEPH D. PEELER, Esq.,
WARD LOVELESS, Esq.

For Respondent:

A. L. MURRAY, Esq.

Docket No. 68722

PACIFIC EMPLOYERS INSURANCE CO.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES:

Transferred to Mr. Arundell 9/16/35.

1932

Dec. 5—Petition received and filed. Taxpayer notified. (Fee paid).

Dec. 6—Copy of petition served on General Counsel.

1933

Jan. 10—Answer filed by General Counsel.

Jan. 18—Copy of answer served on taxpayer—circuit calendar vicinity of Los Angeles, California.

1934

Mar. 30—Hearing set week of June 4, 1934 at Beverly Hills, California.

Apr. 16—Motion for leave to file an amended petition filed by taxpayer. 5/4/34 copy served.

Apr. 30—Amendment to petition lodged.

May 1—Motion to amend petition granted.

June 20—Hearing had before J. C. Adams, Division 12. Submitted on merits. Appearance of G. Britton McConnell, Esq., filed. Answer to amended petition filed 6/11/34—copy served. Taxpayer's brief due July 20, 1934—respondent's due Aug. 20, 1934.

July 19—Order that motion (telegram) for 5 days extension for brief be granted petitioner, entered.

July 23—Brief filed taxpayer. 7/23/34 copy served.

Aug. 20—Brief filed by General Counsel.

1935

Nov. 19—Opinion rendered—C. R. Arundell, Division 7. Decision will be entered for respondent.

Nov. 21—Decision entered—C. R. Arundell, Division 7.

1936

Feb. 17—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Feb. 17—Proof of service filed. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1936

Mar. 23—Praecipe filed.

Mar. 23—Proof of service filed.

Mar. 23—Notice of the appearance of Joseph D. Peeler and Ward Loveless, counsel for taxpayer, filed. **[2]**

United States Board of Tax Appeals.
Docket No. 68722.

PACIFIC EMPLOYERS INSURANCE COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION.

The above named petitioner petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau of Symbols IT:AR:E-6 JHL-60D) dated October 7, 1932, and as a basis of its proceeding alleges as follows:

(1) The petitioner is a corporation, organized under the laws of California, with principal office at 928 South Figueroa Street, Los Angeles, California.

(2) The notice of deficiency, a copy of which is attached hereto, was mailed to the petitioner on October 7, 1932, as the petitioner believes.

(3) The taxes in controversy are income taxes for the year 1930. The deficiency is $1,193.45, which amount is in controversy.

(4) The determination of the tax as set forth in said notice of deficiency is based upon the following errors;

(a) In determining the taxable net income of the petitioner for the year 1930 the Commissioner has erroneously understated the net loss for the year 1928, applicable as a deduction against [3] the statutory taxable net gain for the year 1930, to be in amount $8,601.07;

(b) asserting non-taxable interest and dividends should be eliminated as a deduction in the computation of the net loss for the year 1928; as being

(c) retroactively authoritative under Treasury Decision No. 4309, believed to be promulgated under date of March 7, 1931;

(d) and has omitted from consideration or computation in said loss understatement the costs or losses in the insurance business of the petitioner, for the year 1928, in the amount of $8,580.41, bills receivable and agency balances not admitted as *as* asset and

(e) the expense of officers' life insurance in amount of $1,065.00 premium paid.

(5) The facts upon which the petitioner relies are as follows:

(a) In the year 1928 the petitioner removed from its assets, in accord with the practices of the insurance business and the usage and requirement of the insurance department of the State of California, bills receivable and agency balances, essentially bad debts, in the amount of $8,580.41. These items were contained in the gross income, were removed from the net income and/or of the year in/of the operations of the business of the petitioner for said year. [4]

(b) In the year 1928 the petitioner paid, as an expense of its business operations, premiums for insurance on the life of its officers, in the amount of $1,065.00. This amount was charged against its business operation income, reducing the surplus of the year.

(c) The petitioner believes the aforementioned items $8,580.41 and $1,065.00 are strictly pertinent to and a part of the operations of the petitioner's business for the year 1928; should be considered, computed in determination of the net loss in controversy as forcefully as the non-taxable dividends (6,837.06), municipal bond interest ($2,111.42) and tax interest ($47.15) eliminated by the Commissioner; that

(d) non-allowance of these realized losses in business as a deduction causes the pertinent deficiency herein involved to operate as a tax on capital; that

(e) tax exempt income and tax exempt expense peculiar to the insurance business requires like treatment in equity; that

(f) the net loss claimed for the year 1928 (deducted from the net income for the year 1930) should be increased $1,044.34 and (petitioner accepting the depreciation adjustment as made by the Commissioner) the 1930 income should be increased $1,344.35, resulting in an additional taxable income for the year 1930 in amount of $300.01.

(6) Wherefore, the petitioner prays that this Board may [5] hear the proceeding and determine that the deficiency due from the petitioner for the year 1930 should not be in excess of $36.00.

PACIFIC EMPLOYERS INSURANCE COMPANY
By W. R. KILGORE
President.
By VICTOR MONTGOMERY
Secretary.
928 South Figueroa Street,
Los Angeles, California.

State of California,
County of Los Angeles—ss.

Victor Montgomery, being duly sworn, says that he is the Secretary of the Pacific Employers Insurance Company, the above named petitioner; that he has read the foregoing petition and is familiar with the statements contained therein and the facts stated are true.

VICTOR MONTGOMERY
928 South Figueroa Street,
Los Angeles, California.

Subscribed and sworn to before me this 30th day of November, 1932 A. D.

FANNIE de GAUNA

Notary Public in and for the County of Los Angeles, State of California. [6]

State of California,
County of Los Angeles—ss.

W. R. Kilgore, being duly sworn, says that he is the vice-president of the Pacific Employers Insurance Company, the above named petitioner; that he has read the foregoing petition and is familiar with the statements contained therein and the facts stated are true.

W. R. KILGORE
928 South Figueroa Street,
Los Angeles, California.

Subscribed and sworn to before me this 30th day of November, 1932 A. D.

FANNIE de GAUNA

Notary Public in and for the County of Los Angeles, State of California. [7]

TREASURY DEPARTMENT
Washington

Oct. 7, 1932

Pacific Employers Insurance Co.,
928 South Figueroa Street,
Los Angeles, California.

Sirs:

You are advised that the determination of your tax liability for the year(s) 1930 discloses a deficiency of $1,193.45, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; WHEREAS IF

THIS FORM IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner.

By J. C. WILMER,

Deputy Commissioner.

Inclosures:

Statement

Form 882

Form 870. [8]

EXHIBIT A.

STATEMENT

IT:AR:E-6

JHL-60D

In re: Pacific Employers Insurance Co.,
928 South Figueroa Street,
Los Angeles, California.

Income Tax Liability

Year—1930.

Income Tax Liability—$6,042.81.

Income Tax Assessed—$4,849.36.

Deficiency—$1,193.45.

The deficiency shown herein is based upon the report dated March 31, 1932, prepared by Revenue Agent G. W. Givan and transmitted to you under date of April 20, 1932, which report is made a part of this letter. [9]

EXHIBIT B.

Revenue Agent G. W. Givan's report, transmitted under date of April 20, 1932, incorporated as part of assessment letter.

Pacific Employer's Insurance Co.

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PRELIMINARY STATEMENT

The deficiency in tax proposed is due to the adjustment of depreciation in 1930 and the elimination of nontaxable interest and dividends deducted in the computation of the net loss for the year 1928.

The changes have been discussed with Mr. B. H. Dennison, taxpayer's accountant, who does not agree to changes made in the net loss for 1928. He does not agree to the T. D. 4309 which requires the inclusion of nontaxable income in computing a net loss.

Depreciation as recommended is believed to be substantially correct and none has been claimed on exhausted assets.

The indicated net loss of $136,533.65 for the year 1927 has been applied against the net income of $123,195.93 for the year 1929. It is rather evident from a casual examination of the retained return for these years that any changes developed for the

years 1927 and 1929 would not be sufficient to absorb any of the 1928 loss which has been applied against the 1930 income. [10]

SCHEDULE 1.

Year ended December 31, 1930.

Net Income.

Net income as disclosed by return		$40,411.33
As corrected		50,356.75
Net adjustment		$ 9,945.42
Unallowable deductions and additional income:		
a. Depreciation overstated	$1,344.35	
b. Net loss year 1928 overstated	8,601.07	
Net adjustment as above		$ 9,945.42

SCHEDULE 1-A.

Year ended December 31, 1930.

Explanation of Items.

a. Depreciation recommended	888.70
Depreciation claimed	2,233.05
Difference	$1,344.35

Difference is due to change in cost basis and to the elmination of depreciation for prior years deducted in 1930.

Detail of Depreciation Recommended.

Assets		Cost	Rate	Amount
Concrete-frame office	1926	$12,000.00		
	1929	14,290.00		
		$26,290.00	3%	$788.70
Frame rentals	1930	4,000.00	5% 6 mo.	100.00
Depreciation allowable				$888.70

[11]

Brought forward	$888.70	
Depreciation per return	2,233.05	
Excessive depreciation	$1,344.35	
b. Net loss year 1928 as claimed on return		$92,368.43
Net loss year 1928 as amended		83,767.36
Difference		$ 8,601.07

Difference due to the elimination of dividends and nontaxable interest deducted by the taxpayer in computing the net loss for the year 1928. This is in conformity with Treasury Decision 4309—March 7, 1931.

Detail.

Net loss per return 1936		$228,902.08
Less:		
1927 loss included therein		136,533.65
Net loss per return item 22(b)		$ 92,368.43
Less:		
Depreciation on concrete-frame building cost $12,000.00 at 3%	$360.00	
Federal Stamp taxes paid	34.56	394.56
		$92,762.99
Plus:		
Interest Municipal bonds deducted	$2,111.42	
Dividends corporation stock deducted	6,837.06	
Interest received income tax refund	47.15	8,995.63
Net loss year 1928 as amended		83,767.36

[12]

Reconciliation Municipal Bond Interests 1930		
Interest received 1930		$3,704.50
Interest accrued 12/31/29		1,360.00
		$5,064.50
Less:		
Interest purchased 1930	$ 324.59	
Interest accrued 12/31/29	1,945.00	2,269.59
Nontaxable interest as reported		$2,794.91

Schedule 2.
Computation of Tax.

Year ended December 31, 1930.

Net income for taxable year	$50,356.75
Balance subject to tax	$50,356.75
Income tax at 12%	$ 6,042.81
Total tax assessable	$ 6,042.81
Total previously assessed	4,849.36
Additional tax to be assessed	$ 1,193.45

[Endorsed]: U. S. Board of Tax Appeals. Filed Dec. 5, 1932. [13]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph (1) of the petition.

(2) Admits that the notice of deficiency was mailed to petitioner on October 7, 1932.

(3) Admits that the tax in controversy is income tax for the year 1930.

(4) Denies that the respondent erred as alleged in paragraph (4), subparagraphs (a) to (e), inclusive, of the petition.

(5) Denies all the material allegations contained in paragraph (5), subparagraphs (a) to (f), inclusive, of the petition.

(6) Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

FRANK A. SURINE,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: U. S. Board of Tax Appeals. Filed Jan. 10, 1933. [14]

[Title of Court and Cause.]

AMENDMENT TO PETITION.

Petitioner amends its petition herein as follows:

By adding to Paragraph 4 of the original petition the following subsection:

(f) the Commissioner has erroneously used the difference between the claims filed as of the end of the years 1929 and 1930 in conjunction with the losses paid to establish the liability for the unpaid losses to be deducted for income tax computation.

By adding to Paragraph 5 of the original petition the following subsection:

(g) the computation of the losses to be deducted in accordance with the report filed by deponent with the Insurance Commissioner of the State of California and as provided by the law of the State of California, submitted on the Convention Edition Form were as follows:

[15]

Losses paid in 1930	$ 872,735.74
Less salvage adjustments	6,934.19
	865,801.55
Losses unpaid at end of 1930	596,532.85
	1,462,334.10
Losses unpaid at end of 1929	440,318.52
Total deductible losses	1,022,015.88
Losses erroneously reported in 1930 Return	882,632.55
Understatement of losses	$ 139,383.33
Net income reported in 1930	$ 40,411.33
Additional losses per above statement	139,383.33
Create a Statutory Net Loss of	$ 98,972.00

By taking from Paragraph 6 of the original petition the full sentence thereof; and

By adding to Paragraph 6 of the original petition wherefor the taxpayer petitioner respectfully prays that this Board may hear and determine its appeal.

PACIFIC EMPLOYERS
INSURANCE COMPANY
By W. R. KILGORE
Vice President.
By B. H. DENISON
Assistant Secretary.
928 South Figueroa St.,
Los Angeles, California.

State of California
County of Los Angeles—ss.

B. H. Denison, being duly sworn, says that he is the Assistant Secretary of the Pacific Employers Insurance Company, the above named petitioner; that he has read the foregoing petition and is familiar with the statements contained therein and the facts stated are true.

B. H. DENISON
928 South Figueroa St.,
Los Angeles, California.

Subscribed and sworn to before me this ..... day of April, 1934, A. D.

FANNIE de GAUNA
Notary Public in and for the County of Los Angeles, State of California. [16]

State of California
County of Los Angeles—ss.

W. R. Kilgore, being duly sworn, says that he is the Vice President of the Pacific Employers Insurance Company, the above named petitioner; that he has read the foregoing petition and is familiar with the statements contained therein and the facts stated are true.

W. R. KILGORE
928 South Figueroa St.,
Los Angeles, California.

Subscribed and sworn to before me this ..... day of April, 1934 A. D.

FANNIE de GAUNA

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: U. S. Board of Tax Appeals. Filed May 1, 1934. [17]

[Title of Court and Cause.]

ANSWER TO AMENDMENT TO PETITION.

Now comes the Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, and in answer to the amendment to petition of the above-named taxpayer, admits and denies as follows:

4.(b) Denies that respondent erred as alleged in paragraph 4, sub-paragraph (f) of the Amendment to the Petition.

5.(g) For lack of information and knowledge sufficient to form a belief as to the truth or falsity of the allegations as contained in sub-paragraph (g) of paragraph 5 of the amendment to petition, denies the same.

Denies generally and specifically each and every allegation contained in the amendment to petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the Commissioner's determination in all things be approved.

ROBERT H. JACKSON
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

ARTHUR L. MURRAY,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: U. S. Board of Tax Appeals. Filed Jun. 11, 1934. [18]

[Title of Court and Cause.]

STIPULATED STATEMENT OF FACTS.

IT IS STIPULATED, BY AND BETWEEN THE PARTIES HERETO, by their respective counsel, the Honorable Board consenting:

I.

Petitioner hereby waives the questions raised by the allegations of subparagraphs (a), (b), (c), (d) and (e) of paragraph 4 of the Petition, leaving for decision only the issue raised by subparagraph (f) of paragraph 4 of the Amendment to Petition.

II.

Petitioner is the type of insurance company which is subject to tax under the provisions of Section 204 of the Revenue Act of 1928.

III.

That the tax in controversy relates solely to the year 1930.

IV.

That if the method of computing taxable income applied by respondent is sustained by the Board, then petitioner will be required to pay a deficiency tax in the amount of $1,193.45, as set forth in the deficiency letter issued by respondent.

If the method of computing taxable income which your petitioner contends is correct is sustained by the Board, there is an over-payment of petitioner in the amount of $1,212.24. [19]

V.

That the only items in the computation of taxable income involved in this controversy are two factors necessary to arrive at the amount of a 1930 deduction for losses incurred and consist of unpaid losses at the beginning and at the end of the year 1930.

VI.

That petitioner, Pacific Employers Insurance Company, was incorporated under the laws of the State of California on July 26, 1923, and commenced business under Certificate of Authority issued to it by the Insurance Commissioner of the State of California on October 1, 1923, and is now and at all times since said date has been operating an insurance business under said authority. That said business is confined solely to the State of California, and is regulated solely by the laws of the State of California.

That the principal business written by the petitioner is Workmen's Compensation Insurance and approximately fourteen-fifteenths of the net premium income of petitioner for the year 1930 was from this source. That a large portion of this business is written on a policyholders participating basis. That the balance of the premium income of petitioner was from automobile liability, collision and property damage insurance, principally, and a small volume from public liability and theft insurance.

VII.

That with respect to the year 1930, your petitioner filed its income tax return on Form No. 1120, as required by respondent. That said income tax return shall be deemed to be in evidence herein and the pertinent portions thereof may be referred to by the parties and by the Board in the discussion and consideration of the question presented.

VIII.

That said income tax return on Form No. 1120 contains the following items, to-wit: [20]

"Losses paid		$865,801.55
End (losses unpaid at end of 1930) 1930	$660,980.00	
End (losses unpaid at end of 1929) 1929	644,149.00	16,831.00
Losses Incurred		$882,632.55

VIII (a)

That of the total of $660,980.00, above stated, the sum of $60,884.00 relates to liability claims, and the

balance of $600,096.00 relates to compensation claims.

That of the total of $644,149.00, above stated, the sum of $41,491.00 relates to liability claims and the balance of $602,658.00 relates to compensation claims.

That the amount of losses unpaid above stated, which were stated in said form No. 1120, are computed as follows:

The losses unpaid on liability claims are determined from an estimate of the ultimate cost of final adjustment of each outstanding unadjusted claim made by a Claim Examiner, the total being the sum of such estimates on each such claim. That in estimating such liability claims, the Claim Examiner considers the following elements:

a. The existence of legal liability of the policy holder;
b. The nature of the injuries;
c. The amount demanded by the claimant;
d. The probable cost of compromise settlement;
e. The estimated amount of judgment if the claim is unsuccessfully defended.

That the losses unpaid on compensation claims are determined from an estimate of the ultimate cost of final adjustment of each outstanding unadjusted claim made by a Claim Examiner, the total being the sum of such estimates on each such claim. That in estimating such compensation claims, the Claim Examiner considers the following elements:

a. The existence of legal liability of the policy holder.

b. The nature of the injuries;

c. The amount of benefits provided under the Workmen's Compensation Insurance and Safety Act of California;

d. The effect of a particular type of injury upon the injured individual, considering his age, general physical condition and morale; [22]

e. Estimates of attending physicians (which may be conflicting) as to the duration and effect of disability caused by an injury;

f. The potential liability in each case of permanent or new and further disability and awards of the Industrial Accident Commission therefor during the continuing jurisdiction of said Commission under Section 20 (d) of the California Statute, for a period of 245 weeks from the date of injury.

The provisions of the Workmen's Compensation Act of California as administered and interpreted by the courts of California. [23]

That the estimates of individual Claim Examiners, with respect to particular claims, sometimes vary considerably.

That such estimates are made at the inception of each claim presented and are revised from time to time.

IX.

That in addition to the income tax return on Form No. 1120, above mentioned, petitioner filed with said Form No. 1120, and attached thereto, a copy of pages 1 to 20, inclusive, of its "Annual Statement for the Year Ending December 31, 1930,

of the Condition and Affairs of the Pacific Employers Insurance Company", of the Form "Miscellaneous Stock Companies—Convention Edition 1930". That said portion of said Annual Statement is from the "Annual Statement Approved by the National Convention of Insurance Commissioners", referred to in subparagraph b (1) of Section 204 of the Revenue Act of 1928.

That said portion of said Annual Statement may be deemed to be a part of the record herein and may be referred to in the consideration of this case. For the purpose of making an exhibit, complete in itself, certified copies of pages 3, 4, 5 and 8 of said portion of said Annual Statement which was submitted with the 1930 return, are filed herewith, in connection with certified copies of pages 24 and 25 of said Annual Statement for the year 1930, as filed with the Insurance Commissioner of the State of California. Said certified copies are marked, respectively, petitioner's exhibits 1, 2, 3, 4, 5 and 6.

That for the purpose of this case all of the statements contained therein are deemed to be correct.

X.

That the items of unpaid losses appearing in said Exhibits, as hereinafter specified, are computed in accordance with the [21] provisions of Section 602 (a) of the Political Code of California. That for convenience, a copy of said statute, certified by counsel to be correct, is attached hereto and may be marked petitioner's Exhibit 7.

That Section 602 (a) of the Political Code of California is the law governing the business of petitioner and the unpaid loss items set forth in said Annual Statement (Exhibit 4) represent the highest Aggregate Reserve, after deduction for reinsurance, called for at the beginning and end of the taxable year by said law of said State of California. That said unpaid losses represent sums which have been actually held by petitioner, as shown by said Annual Statement (Exhibit 4).

XI.

That the amount of unpaid losses as indicated by said Exhibit 4 are as follows:

Losses paid during taxable year 1930, plus salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, less salvage and reinsurance recoverable outstanding at the end of the taxable year		$865,801.55
Unpaid Losses outstanding at the end of 1930	$596,532.85	
Unpaid losses outstanding at the end of the preceding taxable year	440,318.52	156,214.33
Loses Incurred		$1,022,015.88

Respectfully submitted,
F. BRITTON McCONNELL
Counsel for Petitioner.
ROBERT H. JACKSON
Counsel for Respondent.

[Endorsed]: U. S. Board of Tax Appeals. Fi
Jun. 20, 1934. [24]

III—DISBURSEMENTS

Amount brought forward, $ ———

	(1) Gross amount paid for losses	(2) DEDUCT: Gross Salvage (Sched. H)	(3) DEDUCT: Reinsurance	(4) DEDUCT: Total deduction	(5) Net amount paid policyholders for losses
1. Accident					
2. Health					
3. Non-cancellable accident and health					
4. Auto Liability	79572 85	150 —	39330 03	39480 03	40092 82
5. Liability other than auto	1610 92	—	2175 29	2175 29	564 37
6. Workmen's compensation	844549 68	17823 94	27615 43	45439 37	799110 31
7. Fidelity					
8. Surety					
9. Plate glass					
10. Burglary and theft	6330 68	—	—	—	6330 68
11. Steam boiler					
12. Machinery					
13. Auto property damage	18104 53	785	8683 25	8691 60	9412 93
14. Auto collision	30087 07	3658 17	12984 83	16642 00	13444 07
15. Property damage and collision other than auto					
16. (a) Other Auto	5452 80	5429 90		5429 90	4909 40
17. TOTALS	985707 93	22 18286	90 789 03	112972 19	872 73574	$ 872735 74

18.	Investigation and adjustment of claims, viz:							
19.	Accident $ ——;	Health $ ——;	Non-cancellable accident and health $ ——;	Auto liability $ 12253 31;				
20.	Liability other than auto $ 80698;	Workmen's compensation $ 126871 04;	Fidelity $ ——;	Surety $ ——;				
21.	Plate glass $ ——;	Burglary and theft $ ——;	Steam boiler $ ——;	Machinery $ ——;				
22.	Auto property damage $ 2998 32;	Auto collision $ 3231 46;	Property damage and collision other than auto $ ——;	(a) Other Auto $ 3321 47;				146394 27
23.	Policy fees retained by agents							
24.	Commissions or brokerage, less amount received on return premiums and reinsurance for the following classes:							
25.	Accident $ ——;	Health $ ——;	Non-cancellable accident and health $ ——;	Auto liability $ 8387 05;				
26.	Liability other than auto $ 13822;	Workmen's compensation $ 132447 37;	Fidelity $ ——;	Surety $ ——;				
27.	Plate glass $ ——;	Burglary and theft $ 6704 18;	Steam boiler $ ——;	Machinery $ ——;				
28.	Auto property damage $ 3212 06;	Auto collision $ 4639 65;	Property damage and collision other than auto $ ——;	(a) Other Auto $ 1606 13;				157194 56
29.	Salaries and all other compensation of officers, directors, trustees and home office employees							50430 —
29A.	Home office travel							28968
30.	Salaries, traveling and all other expenses of branch office employees and agents not paid by commissions							27600 —
31.	Medical examiners' fees and salaries							—
32.	Inspections, including accident prevention							16700 —
33.	Rents, including $ 6600 for company's occupancy of its own buildings							10500 —
34.	General office maintenance and expense							31218
35.	Repairs and expenses (other than taxes) on real estate							15476
36.	Taxes on real estate							23945
37.	Taxes, licenses and fees:							
	(a) State taxes on premiums					$ 40 88587		
	(b) Insurance department					21821		
	(c) Other state taxes					—		
	(d) Federal					———		
	(e) All other (except on real estate)					———		411040 8
38.	Legal expenses $ 1331 46;	advertising $ —;	printing and stationery $ 7310 19					8641 65
39.	Postage, telegraph, telephone, exchange and express $ 7380 —;	insurance $ 114562						85256 4
40.	Furniture and fixtures $ ——;	books, newspapers and periodicals $ ——						—
41.	Bureau and Association dues and assessments							8227 15
42.	Stockholders for dividends (amount declared during the year, cash $ 24000 —;	stock $ ——)						24000 —
43.	Policyholders for dividends, less $ —— dividends received from reinsuring companies							
44.	Other disbursements (give items and amounts):							
45.	Miscellaneous and Investment Expense					$ 132 26		
46.	Refunds to Policyholders under matured annual part. Contracts					170632 31		140764 57
47.	Remittances to Home Office from United States Branch (gross)							
48.	Borrowed money repaid (gross)							
49.	Interest on borrowed money							
50.	Agents' balances charged off							
51.	Gross loss on sale or maturity of ledger assets, viz:							
	(a) Real estate, per Schedule A					$ ———		
	(b) Bonds, per Schedule D					685 80		
	(c) Stocks, per Schedule D					750 00		1435 80
52.	Gross decrease, by adjustment, in book value of ledger assets, viz:							
	(a) Real estate, per Schedule A					$ ———		
	(b) Bonds, per Schedule D					———		
	(c) Stocks, per Schedule D					———		
53.	Total Disbursements							$ 1532047 08
54.	BALANCE							$ 1433345 62

(a) Enter "Credit," "Live Stock," or "Sprinkler."

IV—LEDGER ASSETS

1.	Book value of real estate (less $ 25,000 incumbrances), per Schedule A		$ 522081 00
2.	Mortgage loans on real estate per Schedule B, first liens $ 103,000 00		
	other than first		103,000 00
3.	Loans secured by pledge of bonds, stocks or other collateral, per Schedule C		
4.	Book value of bonds, $ 277,246 50 ; and		
	stocks, $ 271,445 32 ; per Schedule D		548,691 82
5.	Cash in company's office $		
6.	Deposits in trust companies and banks not on interest, per Schedule N		
7.	Deposits in trust companies and banks on interest, per Schedule N	124,101 83	124,101 83
8.	Gross premiums, less return premiums and reinsurance, in course of collection, viz:	(1) On policies or renewals effective on or after October 1st Current Year	(2) On policies or renewals effective prior to October 1st Current Year
9.	Accident $	$	
10.	Health		
11.	Non-cancellable accident and health		
12.	Auto liability All Lines	81,023 54	5605 56
13.	Liability other than auto	311 38	36562
14.	Workmen's compensation	244,285 46	11,893 93
15.	Fidelity		
16.	Surety		
17.	Plate glass		
18.	Burglary and theft	3505 30	
19.	Steam boiler		
20.	Machinery		
21.	Auto property damage		
22.	Auto collision		
23.	Property damage and collision other than auto		
24.	(a)		
25.	TOTALS $	332,23268 $	17863 11 950,095 79
26.	Bills receivable		
27.	Other ledger assets, viz:		
28.	Mortgage Guarantee Certificates	$ 120,000 00	
29.	Building Loan Certificates	131,179 38	
30.			251,179 38
31.	Ledger Assets, as per Balance on page 3		$ 1,433,348 62

NON-LEDGER ASSETS

32.	Interest due, $ and accrued, $ on mortgages, per Schedule B	$ 636 85
33.	Interest due, $ and accrued, $ on collateral loans, per Schedule C, Part I	
34.	Interest due, $ and accrued, $ on bonds, not in default, per Schedule D, Part I	6015 30
35.	Interest due, $ and accrued, $ on other assets (give items and amounts):	
36.	Mortgage Guarantee Certificates	1100 —
37.	Building Loan "	1420 —
38.	Rents due, $ and accrued, $ on company's property or lease	9,172 15
39.	Market value of real estate over book value, per Schedule A	14,984 56
40.	Market value (not including interest in Item 34) of bonds and stocks over book value, per Schedule D	
41.	Other non-ledger assets, viz:	
42.	Due from Re-insurance Companies	$ 19,423 50
43.		19,423 50
44.	Gross Assets	$ 1,476,328 83

DEDUCT ASSETS NOT ADMITTED

45.	Company's stock owned, $; loans on, $		$
46.	Supplies, printed matter and stationery		
47.	Furniture, fixtures and safes		
48.	Gross premiums in course of collection effective prior to October 1 of current year		17,863 11
49.	Bills receivable		
50.	Loans on personal security, endorsed or not		
51.			
52.	Book value of real estate over market value, per Schedule A	$	
53.	Book value of bonds and stocks over market value, per Schedule D	15,367 18	
54.	Book value of other ledger assets over market value, viz:		
55.			
56.			
57.		15,367 18	33,230 29
58.	Total Admitted Assets		$ 1,443,098 54

(a) Enter "Credit," "Live Stock," or "Sprinkler."

V—LIABILITIES

	(1) Adjusted or in process of adjustment	(2) Resisted	(3) *Deduct reinsurance per schedule F, column (2)	(4) Net unpaid claims excluding incurred but not reported	(5) Incurred but not reported	(6) Total net unpaid claims except liability and workmen's compensation claims (excluding expenses of investigation and adjustment)
1. Losses and claims:						
2. Accident						(c)
3. Health						(c)
4. (a) Non-cancellable accident and health						(c)
5. Fidelity						
6. Surety						
7. Plate glass						
8. Burglary and theft						
9. Steam boiler						
10. Machinery						
11. Auto property damage	9739 -		4894 -	4895 -	250 -	5145 -
12. Auto collision	4409 -	—	2204 -	2205 -	250 -	2455 -
13. Property damage and coll. other than auto						
14. (a) Other Coverages	690 -	—	—	690 -	—	690 -
15. TOTALS	14888 -	—	7098 -	7790 -	500 -	8290 -

16. Reserve for unpaid liability losses . . . . . $ 33,379.10
and Workmen's Compensation losses . . . . . 554,363.75 $ 587,242.85

7. Reserve for credit losses on policies expiring in October, November and December of current year, being fifty per cent of $..... gross premiums received on said policies, less $..... paid on losses under said policies . . . . . .

8. Reserve for accrued losses on credit policies in force December 31 of current year, being fifty per cent of $..... earned premiums on said policies, less $..... paid on losses under said policies 596332.85

9. Total unpaid claims . . . . . $ 596332.85

10. Estimated expenses of investigation and adjustment of unpaid claims:

1.	Accident	$.....	Health	$.....	Non-cancellable accident and health	$.....	Fidelity	$.....	
2.	Surety	$.....	Plate glass	$.....	Burglary and theft	$.....	Steam boiler	$.....	
3.	Machinery	$.....	Auto prop. damage	$ 300 -	Auto collision	$ 200 -	Property damage and collision other than auto	$.....	
4.	(b)	$.....		$.....		$.....		$.....	500 -

5. Total unearned premiums as shown by recapitulation, page 7 . . . . . 170963 -

6. (c) Additional reserve on non-cancellable accident and health policies $....., less $..... reserve on policies reinsured .....

13. Commissions, brokerage and other charges due or to become due to agents or brokers on policies effective on or after October 1 of current year, viz:

1.	Accident	$.....	Health	$.....	Non-cancellable accident and health	$.....	Auto liability	$.....	
2.	Liability other than auto	$ 549.68	Workmen's compensation	$ 20,693.04	Fidelity	$.....	Surety	$.....	
3.	Plate glass	$.....	Burglary and theft	$.....	Steam boiler	$.....	Machinery	$.....	
4.	Auto fire & theft	$ 21,896.36	Auto collision	$.....	Property damage and collision other than auto	$.....	(b)	$.....	43118.08

14. Salaries, rents, expenses, bills, accounts, fees, etc., due or accrued . . . . . .

15. Estimated amount hereafter payable for federal, state and other taxes based upon the business of the year of this statement 5913790

16. Dividends declared and unpaid to stockholders, $..... to policyholders, $.....

17. Due and to become due for borrowed money . . . . . .

18. Interest due or accrued . . . . . .

19. Other liabilities, viz:

20.	Re-insurance payable	$ 28,802.31
21.	Refunds to policy holders on matured annual participating contracts	20,791.35
22.		
41.		
42.		
43.		
44.		49593.66
45.	Total amount of all liabilities, except capital	$ 7906592.49
46.	Capital paid up	$ 300,000 -
47.	Surplus over all liabilities	5233290.51
48.	Surplus as regards policyholders	5533290.51
49.	Total	$ 13439883.00

(a) Enter "Credit (on policies expiring prior to October of current year)," "Live Stock," or "Sprinkler."
(b) Enter "Credit," "Live Stock," or "Sprinkler."
(c) State reserve basis and describe methods used.
(d) Including $..... for present value of life indemnity claims.

STATEMENT FOR THE YEAR 1930 OF THE

UNDERWRITING AND INVESTMENT EXHIBIT

Showing the Sources of the Increase and Decrease in Surplus During the Year

		Gain in Surplus	Loss in Surplus
UNDERWRITING EXHIBIT			
PREMIUMS			
1. Total premiums, per item 20, page 2	1598.789.27		
2. Add unearned premiums and additional reserve December 31 of previous year, per item 8 of last year's exhibit	1786449.32		
3. Total	17774335.59		
4. Deduct unearned premiums and additional reserve Dec. 31 of current year, per items 25 and 25½ page 6	1709936.00		
5. **Premiums earned during the year**		16064705.59	
LOSSES			
6. Losses paid, per item 17, page 3	8727357.74		
7. Add salvage and reinsurance recoverable December 31 of previous year, per item 13 of last year's exhibit	124893.01		
8. Total	8852250.75		
9. Deduct salvage and reinsurance recoverable December 31 of current year, per items (a) Jv, page 4	1942350		
10. Balance	6650801.55		
11. Add unpaid losses December 31 of current year, per item 19, page 5	1961328.45 ~~5499999.45~~		
12. Total	8612130.00 ~~11849805.00~~		
13. Deduct unpaid losses December 31 of previous year, per item 15 of last year's exhibit	4403318.52	10220151.88 ~~7999805.88~~	
14. **Losses incurred during the year**			
UNDERWRITING EXPENSES			
15. (c) Underwriting expenses paid during the year, per disbursement exhibit, page 3	4791689.81		
16. (a) Add underwriting expenses unpaid December 31 of current year, per liabilities exhibit, page 5, viz:—	1918558.29		
17. Total	6710248.10		
18. Deduct underwriting expenses unpaid December 31 of previous year, per item 20 of last year's exhibit	1212780.80		
19. **Underwriting expenses incurred during the year**		489599.30	5511615.18 ~~1512305.18~~ ~~4999310.00~~
20. **Underwriting losses and expenses**			
21. (b) Gain **from underwriting during the year**			~~4487705.00~~ 4487705.00
UNDERWRITING PROFIT AND LOSS ITEMS			
22. Gain from:			
23. Inspections, per item 21, page 2			
24. Agents' balances previously charged off, per item 37, page 2	28121		
25. Other underwriting income, per income exhibit, page 2(a)			
26. Total	28121		
27. Loss from:			
28. Agents' balances charged off, per Item 50, page 3			
29. Other underwriting disbursements, per disbursement exhibit, page 3, other than losses and expenses, per items 6 and 15 of this exhibit (a) 46 page 3 Loss decrease, reinsurance, # 4945	1378786		
30. Total	1378786		
31. (b) Loss from items 22 to 30	1375979.45		
32. Bills receivable and premiums in course of collection not admitted December 31 of previous year, per item 37 of last year's exhibit $ 39223.55			
33. Bills receivable and premiums in course of collection not admitted December 31 of current year, per items 48 and 49, page 4 $ 17863.11			
34. (b) Loss from items 32 and 33	40392.7		
35. (b) Loss from profit and loss items		1416372	
36. (b) Loss from underwriting and profit and loss items during the year (Carried forward)			4079133 ~~4487705~~

(a) Give statement number of each item or portion thereof included herein.
(b) Write "Gain" or "Loss".
(c) In order to secure uniformity in the reports of the various companies, all companies are directed to include in this item all disbursements, except payments to policyholders, per item 17, page 3; agents' balances charged off, in item 50, page 3; repairs, expenses and taxes on real estate, such other taxes and fees as apply to investments and personal property only. To include to stockholders; loss on sale or maturity and decrease in book value of ledger assets, and such other items, if any, as are known to apply exclusively to the assets of the company, and to deduct from the total of said items an investment expense one-eighth of one per cent. of the mean invested assets, viz: Real estate owned, mortgage loans, collateral loans and stocks and bonds owned.

Form 3

ANNUAL STATEMENT FOR THE YEAR 1930 OF THE Pacific Employers Insurance Co.
(Write in name of Company)

SCHEDULE P—Part 1

Reserve for Unpaid Liability Losses December 31 of Current Year

SCHEDULE OF EXPERIENCE

Years in which liability policies were issued	(a) Gross liability premiums on policies written or renewed	Amount of earned liability premiums (See notes b and c)	(d) Liability loss payments	(e) LIABILITY LOSS EXPENSE PAYMENTS: Allocated	Unallocated	Total (Col. 4 plus Col. 5)	Liability loss and loss expense payments (Col. 3 plus Col. 6)	Percentage of payments to premiums earned (Col. 7 divided by Col. 2)	LIABILITY SUITS PENDING DEC. 31 OF CURRENT YEAR: Number of suits	Amount charged for each suit	Total suit liability (Col. 9 times Col. 10)	Total estimated reserve for liability losses, case-basis	Total liability losses (Sum of Items in Cols. 7 and 12)	Liability loss ratio (Col. 13 divided by Col. 2)
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
1st Period Prior to 1921	$	$	$	$	$	$	$			$ 1,500	$	$	$	
2d period 1921										1,000				
1922										1,000				
1923										1,000				
1924										1,000				
1925										1,000				
1926										850				
1927	26113.31	26113.31	20.506.40	380.65	396.51	777.16	28.281.56	108.3	2	425.850	850	885.-	32.166.56	123.1
Total 2d period	26113.31	26113.31	20.506.40	380.65	396.51	777.16	28.281.56	108.3	2		850	885.-	32.166.56	123.1
3d period 1928	50801.02	50801.02	29.457.31	4475.78	4908.05	9383.83	34.841.14	68.6	9	375.750	3375	10.193	45.033.14	88.6
1929	57630.36	57630.36	21.359.42	3521.49	5548.43	9070.92	30.430.34	52.8	8	375.750	3000	7.461	41.891.34	72.7
1930	89.074.13	46453.13	9009.09	296.77	2974.80	3271.57	12.330.66	26.6	9	375.750	3375	22.491	37.821.	85.3
Total 3d period	197.505.51	153.884.51	59.825.82	8.798.04	12.981.28	21.779.32	77.605.14	50.2	26		9750	42.144.-	120.749.14	81.1
Grand totals	$223.618.82	$ 181.197.82	$ 76.332.22	$12.607.69	16.945.79	29.553.48	$105.885.70	58.4	28	$	10.600	$ 53.945.-	$ 185.799.70	89.2

COMPUTATION OF RESERVE FOR UNPAID LIABILITY LOSSES

Years in which liability policies were issued	60% of earned premiums stated in Col. 2, third period	Deduct loss payments and expense stated in Col. 7, third period	Remainder (Col. 15 less Col. 16) If negative enter "0"	Liability suits at $750 each (Col. 11, third period)	Carry out for year 1928 amount stated in Col. 17 or 18, whichever is greater, and for years 1929-1930 amount stated in Col. 17	AS COMPUTED BY THE COMPANY: Voluntary additional reserves for unpaid liability losses	Total liability loss reserves (Col. 19 plus Col. 20)	Total incurred liability losses (Col. 16 plus Col. 21)	Incurred loss ratio (Col. 22 divided by Col. 2) %
	(15)	(16)	(17)	(18)	(19)	(20)	(21)	(22)	(23)
1928	$ 30.480.61	$ 34.841.14	$ 0	$ 3375.-	$ 3375.-	$ 6817.-	$ 9192.-	$ 45.033.14	88.6
1929	34.578.22	30.430.34	4.144.88	3000.-	4.144.88		4.144.88	34.575.22	60.0
1930	27.991.88	12.330.66	15.661.22	3375	19.036.22		19.036.22	22.371.88	60.0
Totals	$ 93.050.71	$ 77.602.14	$ 19.806.10	$ 9750.-	$ 26.556.10	$ 6817.-	$ 32.373.10	$ 102.062.24	69.2

(24)	Reserve for.....suits pending on policies issued prior to 1921 (Col. 11 first period)	$ 3581
(25)	Reserve for.....suits pending on policies issued during second period (Col. 11, total second period)	29.998.10
(26)	Reserve for third period (total of Col. 21)	
(27)	Total reserve for unpaid liability losses (Carry to Page 6, Line 16 of the Statement, the total or total of Column 12, whichever is greater)	$ 33.579.10

Distribution of Unallocated Liability Claim Expenses

For Companies which have been issuing Policies 5 Years or more.

Calendar years in which payments were made	Amount of unallocated liability payments	Prior to 1921	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930
Prior to 1930	$							3%	10%		6%	
1930												
Totals	$											

Form 3

ANNUAL STATEMENT FOR THE YEAR 1930 OF THE Pacific Employers Ins. Co.
(Name or stamp name of Company)

SCHEDULE P—Part 2

Reserve for Unpaid Workmen's Compensation Losses December 31 of Current Year

SCHEDULE OF EXPERIENCE

Years in which compensation policies were issued	(a) Gross compensation premiums on policies written or renewed (28)	Amount of earned compensation premiums (See notes b and c) (29)	(d) Compensation loss payments (30)	(e) COMPENSATION LOSS EXPENSE PAYMENTS: Allocated (31)	Unallocated (32)	Total (33)	Compensation loss and loss expense payments (Col. 30 plus Col. 33) (34)	Percentage of payments to premiums earned (Col. 34 divided by Col. 29) (35)	Unpaid Compensation claims December 31 of current year: No. (36)	Present value at 4 per centum interest of estimated future payments (37)	Total compensation losses (sum of items in Cols. 34 and 37) (38)	Compensation loss ratio (Col 38 divided by Col. 29) % (39)
First Period Prior to 1921	$	$	$	$	$	$	$			$	$	
1921												
1922												
1923	49 705 94	43 705 99	18 355 57		12 169 10	12 169 10	30 524 67	70 0			30 524 67	69 8
1924	337 963 80	337 95380	132 970 53	80 80	30 795 81	30 795 81	213 847 14	63 2			213 847 14	63 3
1925	196 526 16	106 526 16	505 491 27	28 17 86	53 278 61	53 278 61	561 567 74	69 4		502 —	561 065 74	69 5
1926	908 589 63	908 589 63	613 130 09	23 69 54	94 700 38	94 700 38	710 200 01	78 1		4073 —	714 273 01	78 6
1927	1 232 388 19	1 232 988 19	887 716 05	77 20 64	122 466 28	122 466 28	1 017 903 02	70 2		34916 —	1 052 819 02	73 3
Total first period	3 534 703 77	3 534 703 77	2 267 643 51	12 988 89	313 410 18	313 410 18	2 534 042 58	71 6		38 537 —	2 572 599 58	72 7
Second period												
1928	1 509 175 10 —	1 509 175 10	9 3 002 60	6 177 83	121 056 82	121 056 82	1 040 237 25	68 9		109 630 —	1 149 867 25	76 1
1929	392 901 78	392 901 78	428 395 06	4 152 04	100 054 32	100 054 32	732 591 42	52 5		224 678 —	957 269 42	68 2
1930	542 626 41	542 626 41	191 721 32	985 50	37 107 75	37 107 75	229 814 57	40 8		163 694 92	393 509 49	70 1
Total second period	3 544 704 29	3 444 703 29	1 733 118 98	11 315 37	258 218 89	258 218 89	2 002 643 24	57 8		498 002 92	2 500 646 16	72 1
Grand totals	$ 7 079 408 06	$ 6 979 407 06	$ 4 000 762 49	$ 24 304 26	$ 571 629 07	$ 571 629 07	$ 4 536 685 82	64 5		$ 536 559 92	$ 5 073 245 74	72 4

COMPUTATION OF RESERVE FOR UNPAID COMPENSATION LOSSES

Years in which compensation policies were issued	75% of earned premiums stated in column 29 (40)	Deduct loss payments and expense stated in column 34 (41)	Remainder (Col. 40 less Col. 41 If negative enter "0") (42)	Unpaid compensation claims (Col. 37) (43)	Carry out for years 1928, 1929 and 1930 amount stated in Col. 42 or 43, whichever is greater For years 1923-27 see Col. 39 (44)	AS COMPUTED BY THE COMPANY: Voluntary additional reserve for unpaid compensation losses (45)	Total compensation loss reserves (Col. 44 plus Col. 45) (46)	Total incurred compensation losses (Col. 41 plus Col. 46) (47)	Incurred loss ratio (Col. 47 divided by Col. 29) % (48)
1928	$ 1 056 422 60	$ 1 040 237 25	$ 16 185 35	$ 109 630 —	$ 109 630 —	$ —	$ 109 630 —	$ 1 149 867 25	76 1
1929	735 073 25	732 591 42	242 481 83	224 678 -	242 481 83	—	442 481 83	975 073 25	70 2
1930	393 509 49	229 814 57	163 694 92	163 694 92	163 694 92	—	163 694 92	393 509 49	70 1
Totals	$ 2 435 005 34	$ 2 002 643 24	$ 422 362 10	$ 498 002 92	$ 515 806 75	$ —	$ 515 806 75	$ 2 518 449 99	72 4
(49) Reserve for unpaid compensation losses first period (Col. 37, total first period)					$ 38 557 —				
(50) Reserve for unpaid compensation losses second period (Total of Col. 46)					515 806 75				
(51) Total reserve for unpaid compensation losses					$ 554 363 75				

Distribution of Unallocated Compensation Claim Expenses

For Companies which have been issuing Policies 4 years or more.

Calendar years in which payments were made	Amount of Unallocated Compensation Payments	Prior to 1921	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930
Prior to 1930	$ 463 553 84				12 169 10	30 795 81	53 278 61	94 700 38	116 552 32	109 228 90	46 828 72	-
									59%	91%	82%	
1930	108 075 23								5 913 96	18 27 92	8 225 60	37 107 75
									5%	9%	18%	100%
Totals	$ 571 629 07				12 169 10	30 795 81	53 278 61	94 700 38	122 466 28	121 056 82	100 054 32	37 107 75

Notes: (a) There should be included in this column the gross premiums on policies written or renewed in each of the respective years plus the additional premiums on said policies, less the return premiums, abatement of premiums and reinsurance. Are they so returned in this schedule? Answer:
(b) Earned premiums must include gross premiums charged on all policies written during said period, including all determined excess and additional premiums, less return premiums, other than premiums returned to policyholders as dividends, and less reinsurance premiums and premiums on policies canceled, and less unearned premiums on policies in force. Such premiums must be credited or charged to calendar years in which policies were written. Are they so returned in this statement? Answer:
(c) Any participating t company which has charged in its premiums a loading solely for dividends shall not be required to include such loading in its earned premiums, provided a statement of the amount of such loading has been filed with and approved by the superintendent of insurance.
(d) There should be included with "Loss payments" all payments for first aid and medical attendance. Are they so returned in this statement? Answer:
(e) There should be included with "Loss expense payments" all payments for legal expenses, including attorney's and witness fees and court costs, salaries and expenses of investigators, adjusters and field men, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employees, home office expenses and all other payments un ler or on account of such injuries, whether the payments are allocated to specific claims or are unallocated. Are they so returned in this statement? Answer:

[Title of Court and Cause.]

Docket No. 68722. Promulgated November 19, 1935.

As the Revenue Act of 1928 does not allow deductions for reserves to insurance companies other than life or mutual, a company writing workmen's compensation and liability insurance may not take as a deduction for "unpaid losses" a reserve based on the amount of premiums. The deduction allowable is the amount computed as its probable liability on claims filed.

F. Britton McConnell, Esq., for the petitioner.
Arthur L. Murray, Esq., for the respondent.

OPINION.

ARUNDELL: The respondent determined a deficiency in petitioner's income tax for the year 1930 in the amount of $1,193.45. Upon waiver by petitioner of several alleged errors there is presented but one issue for decision, namely, the amount allowable as a deduction for "losses incurred" within the meaning of section 204(b) (6) of the Revenue Act of 1928. The parties have stipulated that, if the method of computing the amount allowable now advocated by petitioner is proper, there is an overpayment of $1,212.24, otherwise the deficiency determined by the respondent is correct.

The facts were stipulated and we incorporate the written stipulation by reference as our findings of fact.

The petitioner is an insurance company other than a life or mutual company. It is a California corporation, its business is confined solely to the State of California, and is regulated by the laws of that state. It operates under a certificate of authority issued by the Insurance Commissioner of California. Its principal business is the writing of workmen's compensation insurance and approximately fourteen fifteenths of its net premium income was from this source in 1930. The balance of the premium income was from automobile liability, collision and property damage insurance, principally, and a small part from public liability and theft insurance. [31]

In petitioner's income tax return for 1930 it claimed a deduction for losses incurred in the amount of $882,632.55 computed as follows:

Losses paid		$865,801.55
Unpaid losses end of 1930	$660,980	
Unpaid losses end of 1929	644,149	
		16,831.00
Losses incurred		$882,632.55

The amounts of the unpaid losses as set out above were determined from estimates of the ultimate cost of final adjustment of each outstanding claim made by claims examiners, the total being the sum of the estimates on each claim. In making their esti-

mates the claims examiners took into consideration a number of elements which might affect the ultimate cost of adjustment.

Petitioner filed with its 1930 income tax return a portion of its "Annual Statement for the Year Ending December 31, 1930, of the Condition and Affairs of the Pacific Employers Insurance Company" as shown on form "Miscellaneous Stock Companies—Convention Edition 1930." The portion of the statement so filed is from the "Annual Statement Approved by the National Convention of Insurance Commissioners" referred to in section 204(b) (1) of the Revenue Act of 1928. The annual statement so filed contains in the list of "Liabilities" an item designated "Reserve for accrued losses * * * $596,532.85." It also contains in the "Underwriting and Investment Exhibit" the following:

Losses paid	$865,801.55
Add unpaid losses December 31 of current year	596,532.85
Total	1,462,334.40
Deduct unpaid losses December 31 of previous year	440,318.52
Losses incurred during the year	1,022,015.88

The petitioner also filed the aforesaid annual statement with the Insurance Commissioner of California. The statement so filed contains an item

of $33,879.10 designated "Total reserve for unpaid liability losses", and also an item of $554,363.75 designated "Total reserve for unpaid compensation losses." These two items total $588,242.85. Adding to this an item of $8,290 listed "Total net unpaid claims except liability and workmen's compensation" gives the figure of $596,532.85.

The items designated unpaid losses in the annual statement are computed in accordance with the laws of California (sec. 602(a), Political Code) and represent the highest aggregate reserve, after deduction for reinsurance, called for at the beginning and end of the year by the California law. The unpaid losses in the above [32] amounts represent sums which have been actually held by the petitioner.

The petitioner now claims as a deduction for "losses incurred" the amount of $1,022,015.88, computed as above set out, in place of the $882,632.55 claimed in its return. In both computations the item of "losses paid" is the same, $865,801.55. The difference between the parties is as to the amount of "unpaid losses" to be taken into consideration in determining the amount of "losses incurred" within the meaning of the statute.

Section 204 (b) of the Revenue Act of 1928 provides for the inclusion in gross income of investment and underwriting income "computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners * * *."

Among the deductions allowable in determining net income is that for losses, to be computed as follows (sec. 204 (b) (6)):

> To losses paid during the taxable year, * * * add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year * * *.

The statutory provision for the use of the underwriting and investment exhibit is limited to the determination of gross income and does not follow through to the determination of net income. While the respondent has provided in article 992 of Regulations 74 that the "exhibit is presumed clearly to reflect true net income", he has in the same sentence limited the scope of that presumption by stating that the exhibit will be recognized and used as a basis "in so far as it is not inconsistent with the provisions of the Act." Further, "All items of the exhibit, however, do not reflect an insurance company's income as defined in the Act." The proper use of the exhibit in determining income is that of a guide and not a limitation on the application of the statute. American Title Co., 29 B. T. A. 479; affd., 76 Fed. (2d) 332.

In the case of ordinary corporations and of life insurance companies and mutual insurance companies other than life, the taxing statute makes provision for deduction of certain reserves in computing net income. No such provision is contained

in the provisions relating to insurance companies other than life or mutual. Consequently, companies in the latter classification, as this petitioner is, are not entitled to deduct reserves even though they may be required by state law. American Title Co., supra.

The deduction now sought by the petitioner is a deduction for a reserve. While the figure of $596,532.85 now claimed to be unpaid losses at the end of 1930 is so listed in the underwriting and investment exhibit, [33] the supporting schedules, as above pointed out, clearly show that the figures making up this sum are reserves. The details of the supporting schedules show that the starting point in the computation of the amounts making up the $596,532.85 is a percentage of earned premiums. In the schedule of computation of "Reserve for unpaid liability losses" the calculation is based on "60% of earned premiums", and in the "Reserve for unpaid workmen's compensation" there is used "70% of earned premiums." Some of the figures for 1929 are given, but not the final result, and from those given it appears that the calculation for that year was made in the same way. Thus the amount now claimed by the petitioner appears to be essentially a reserve, which is not available to this type of insurance company as a deduction in computing net income.

The amount claimed in the return filed by the petitioner and allowed by the respondent was the result of a careful calculation based on the claims

filed with it. An examiner investigated each claim, took into consideration a number of factors, listed in the stipulation, which might affect the amount of petitioner's liability and arrived at a sum that in his opinion the petitioner would be required to pay. These sums were totaled and the totals were listed by petitioner as the "unpaid losses" and approved by the respondent. In a case analogous on the facts, but arising under the different statutory provisions of the Revenue Act of 1918, deductions for losses calculated as in this case were allowed as "accrued but unpaid losses." Ocean Accident & Guarantee Corporation, Ltd. v. Commissioner, 47 Fed. (2d) 582.

We conclude that the method used by petitioner in reporting unpaid losses in its return was proper and that the method now advanced by it is not in accordance with the statute. The respondent's determination is affirmed.

Decision will be entered for the respondent. [34]

United States Board of Tax Appeals.
Washington.

Docket No. 68722.

PACIFIC EMPLOYERS INSURANCE COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated November 19, 1935, it is

ORDERED and DECIDED: That there is a deficiency in income tax for the year 1930 in the amount of $1,193.45.

[Seal] (s) C. R. ARUNDELL,
Member.

Entered: Nov. 21, 1935. [35]

[Title of Court and Cause.]

PETITION FOR REVIEW OF DECISION BY THE UNITED STATES BOARD OF TAX APPEALS.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, Pacific Employers Insurance

Company, in support of this, its petition, filed in pursuance of the provisions of Section 1001(a) of the Act of Congress approved February 26, 1926, entitled the Revenue Act of 1926, as amended, for the review of the decision of the United States Board of Tax Appeals promulgated November 19, 1935, and its judgment entered on November 21, 1935, in the case of Pacific Employers Insurance Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Number 68722, under Docket of said Board, wherein the Board determined a deficiency of income tax against this petitioner for the calendar year 1930 in the amount of $1,193.45, respectfully shows this Honorable Court as follows:

I.

Statement of the Nature of the Controversy.

1. The petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of [36] California, with its principal office in Los Angeles, California. It operates under a certificate of authority issued by the Insurance Commissioner of California and its business consists principally of the writing of workmen's compensation insurance, together with small amounts of automobile liability, collision, property damage, public liability and theft insurance.

2. On October 7, 1932, the Commissioner of Internal Revenue, in accordance with Section 272 of The Revenue Act of 1928, addressed a letter to the petitioner proposing a deficiency of $1,193.45

for the calendar year 1930. Thereafter, and within the period prescribed by law, petitioner filed with the United States Board of Tax Appeals a petition requesting a redetermination of said deficiency, and said petition was duly docketed under Docket No. 68722; thereafter, petitioner filed an amendment to said petition. The Commissioner of Internal Revenue filed answers in accordance with law by which were raised the issues determined by said decision of the United States Board of Tax Appeals.

3. The sole issue remaining in controversy at the hearing of this cause before the Board arose out of the following facts:

a) Petitioner is an insurance company "other than life or mutual", as described in Section 204, Revenue Act of 1928, and its income taxes for the year in question, 1930, are to be determined under the provisions of said section.

b) On its income tax return for said taxable year, 1930, petitioner claimed a deduction for [37] losses incurred in the amount of $882,-632.55, computed as follows:

Losses paid		$865.801.55
Unpaid losses end of 1930	$660,980	
Unpaid losses end of 1929	644,149	16,831.00
		$882,632.55

The amounts of the unpaid losses as set forth above were determined from estimates of the ultimate cost of final adjustment of each out-

standing claim made by claims examiners, the total being the sum of the estimates on each claim. In making their estimates the claims examiners took into consideration a number of elements which might affect the ultimate cost of adjustment. Said amount of $882,632.55 was allowed as a deduction by respondent. Said return was filed by petitioner with the Collector of Internal Revenue, Los Angeles, California.

c) Petitioner filed with its 1930 return a portion of its "Annual Statement for the Year Ending December 31, 1930, of the Condition and Affairs of the Pacific Employers Insurance Company" as shown on form "Miscellaneous Stock Companies—Convention Edition 1930". The portion of the statement so filed is from the "Annual Statement Approved by the National Convention of Insurance Commissioners" referred to in section 204(b) (1) of the Revenue Act of 1928. Said statement contains in the list of "Liabilities" an item designated "Total Unpaid [38] Claims $596,532.85". It also contains in the "Underwriting and Investment Exhibit" the following:

Losses paid	$865,801.55
Add unpaid losses December 31 of current year	596,532.85
Total	$1,462,334.40
Deduct unpaid losses December 31 of previous year	440,318.52
Losses incurred during the year	$1,022,015.88

The items designated "unpaid losses" in the annual statement were computed in accordance with the laws of California (sec. 602(a), Political Code) and represent the highest aggregate reserve, after deduction for reinsurance, called for at the beginning and end of the year by the California law. The unpaid losses in the above amounts represent sums which have been actually held by the petitioner.

d) Petitioner claims that it is entitled to the deduction for "losses incurred", as described in Section 204(b) (4) and (6), Revenue Act of 1928, the amount of $1,022,015.88, as computed above, in place of the $882,632.55 claimed on its return and allowed by respondent.

3. The Board by its opinion promulgated November 19, 1935, and by its order entered November 21, 1935, has rendered a decision approving the respondent's determination and finding a deficiency of $1,193.45 due from this petitioner for the taxable year 1930. [39]

II.

Determination of Court of Review.

The petitioner, being aggrieved by the said findings of fact, opinion, decision and order, and having filed its 1930 income tax return with the Collector of Internal Revenue at Los Angeles, California, within the Ninth Circuit, desires a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit within which Cir-

cuit is located the office of said Collector of Internal Revenue with whom petitioner filed its income tax return for 1930, the taxable year involved herein.

III.

Assignment of Errors.

The petitioner, as a basis for review, makes the following assignments of error:

1. The Board erred as a matter of law in ordering and deciding that there was a deficiency for the year 1930.

2. The Board erred as a matter of law in failing and refusing to determine that petitioner had made an overpayment of $1,212.24 for the year 1930.

3. The Board erred in its decision and determination as a conclusion of law that petitioner was not entitled to a deduction of $1,022,015.88 for "losses incurred" during said year 1930, as defined in Section 204(b), Revenue Act of 1928.

4. The Board erred in its decision and [40] determination as a conclusion of law that the "unpaid losses" of petitioner outstanding at the end of the preceding taxable year (1929) as defined in Section 204(b), Revenue Act of 1928, was not $440,318.52.

5. The Board erred in its decision and determination as a conclusion of law that the "unpaid losses" of petitioner outstanding at the end of the taxable year 1930, as defined in Section 204(b), Revenue Act of 1928, was not $596,532.85.

6. The Board erred as a matter of law in its determination that the "losses incurred", as designated in Section 204(b) (4) and (6), Revenue Act of 1928, were not to be "computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners", as expressly provided in Section 204(b) (1), Revenue Act of 1928.

7. The Board erred in rendering decision for the respondent.

8. The Board erred in not rendering decision for the petitioner.

WHEREFORE, Your petitioner prays that this Honorable Court may review said findings, decision, opinion and order, and reverse and set aside the same; that it direct the United States Board of Tax Appeals to determine that no deficiency is due by the petitioner in this proceeding, and that the petitioner had made an overpayment of $1,212.24; and for such other and further relief [41] as the Court may deem meet and proper in the premises.

F. BRITTON McCONNELL
340 Roosevelt Building,
Los Angeles, California.
JOSEPH D. PEELER
819 Title Insurance Building,
Los Angeles, California.
WARD LOVELESS
920 Southern Building,
Washington, D. C.
Attorneys for Petitioner [42]

State of California,
County of Los Angeles.—ss.

F. BRITTON McCONNELL, being first duly sworn, deposes and says that he is an attorney of record for the petitioner in the foregoing cause; that as such attorney he is authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief; and that said petition is filed in good faith.

F. BRITTON McCONNELL

Subscribed and sworn to before me this 13th day of February, 1936.

[Seal] CHRISTENE COPELAND
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: U. S. Board of Tax Appeals. Filed Feb. 17, 1936. [43]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To: Herman Oliphant, Esq.,
General Counsel for the
Department of the Treasury,
Washington, D. C.

Sir:

Please take notice that the petitioner on the 17th day of February, 1936, filed with the Clerk of the

United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision by the Board rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you. Dated at Washington, D. C. this 17th day of February, 1936.

Respectfully,
WARD LOVELESS
920 Southern Building,
Washington, D. C.
Attorney for Petitioner. [44]

Personal service of the foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 17th day of February, 1936.

HERMAN OLIPHANT
General Counsel for the
Department of the Treasury.
Attorney for Respondent.

[Endorsed]: U. S. Board of Tax Appeals. Filed Feb. 17, 1936. [45]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and transmit to the Clerk of the United States Circuit Court of Appeals for

the Ninth Circuit, certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the above entitled case.

2. Pleadings before the United States Board of Tax Appeals, as follows:

a) Petition.

b) Answer to petition.

c) Amendment to petition.

d) Answer to amendment to petition.

3. Agreed statement of facts, including exhibits 1 to 6, inclusive, made a part of the agreed statement.

4. The opinion of the Board of Tax Appeals.

5. The decision of the Board.

6. The petition for review, together with proof of service of notice of filing petition for review and of service [46] of a copy of the petition for review.

7. This praecipe, together with proof of service of notice of filing praecipe and of service of a copy of praecipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH D. PEELER
Attorney for Petitioner.

[Endorsed]: U. S. Board of Tax Appeals. Filed March 23, 1936. [47]

[Title of Court and Cause.]

NOTICE OF FILING PRAECIPE FOR RECORD.

To: Commissioner of Internal Revenue,
Washington, D. C.
Arthur H. Kent, Assistant General Counsel,
Washington, D. C.

You are hereby notified that the Pacific Employers Insurance Company, petitioner herein, did, on the 23rd day of March, 1936, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a Praecipe for Record. A copy of this praecipe as filed is hereto attached and served upon you.

Dated this 23rd day of March, 1935.

(s) JOSEPH D. PEELER
Attorney for Petitioner.

Personal service of the above and foregoing notice, together with a copy of praecipe for record, is hereby acknowledged this 23rd day of March, 1936.

HERMAN OLIPHANT
General Counsel for the
Department of the Treasury.

[Endorsed]: U. S. Board of Tax Appeals. Filed March 23, 1936. [48]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 48, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 2nd day of April, 1936.

[Seal] B. D. GAMBLE

Clerk

United States Board of Tax Appeals.

[Endorsed]: No. 8166. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Employers Insurance Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed April 8, 1936.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8166

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Pacific Employers Insurance Company,

Appellant.

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR THE APPELLANT.

JOSEPH D. PEELER,
819 Title Insurance Building,
Los Angeles California;

F. BRITTON MCCONNELL,
340 Roosevelt Building,
Los Angeles California;
Counsel for Appellant.

WARD LOVELESS,
920 Southern Building, Washington, D. C.,
Of Counsel.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

INDEX TO APPENDIX A.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES AND REGULATIONS.

MISCELLANEOUS.

No. 8166

In the United States Circuit Court of Appeals

For the Ninth Circuit.

Pacific Employers Insurance Company,

Appellant.

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

Questions Involved and How Raised.

This case comes before this Court on a petition to review a decision by the United States Board of Tax Appeals (hereinafter referred to for brevity as the "Board") sustaining the Commissioner in the determination of an income tax deficiency against appellant in the amount of $1,193.45 for the taxable year 1930.

The proceedings before the Board arose under a petition and amended petition filed by the appellant for redetermination of the deficiency proposed by the Commissioner. The decision by the Board is reported at 33 B. T. A. 501.

The appellant is an insurance company other than a life or mutual company and the determination of its income and tax for the year 1930 is governed by the provisions of section 204, Revenue Act of 1928. Upon its return for 1930, appellant claimed a deduction of $882,-632.55 for "losses incurred," determined upon a "case claims method" under which the "unpaid loss" on each claim was estimated on the basis of all known facts. This deduction of $882,632.55 has been allowed by respondent and by the Board.

The appellant contends that it is entitled to a deduction of $1,022,015.88 for "losses incurred" determined upon the basis of the "Underwriting and Investment Exhibit" contained in the "Annual Statement Approved by the National Convention of Insurance Commissioners", referred to in section 204(b) (1), Revenue Act of 1928, which was filed with the Insurance Commissioner of California. The deduction for "losses incurred" under this exhibit was computed in accordance with the laws of California, under which appellant operated.

There is no issue on the facts and the question is purely one of statutory interpretation. If Congress intended that the deduction for "losses incurred" should be determined on the basis of the "underwriting and investment exhibit", then it is agreed the appellant has made an overpayment of $1,212.24. If the deduction for "losses incurred" is to be determined without regard to said exhibit, then it is agreed that the deficiency proposed by the respondent and approved by the Board is correct.

All of the facts in the case were presented in a stipulated statement of facts and exhibits thereto attached [Tr. 20-32].

Statement of Facts.

Appellant is an insurance company "other than life or mutual", as described in section 204, Revenue Act of 1928, and its income taxes for the year 1930, here in question, are to be determined under the provisions of that section. [Tr. 20-21.] The appellant was incorporated under the laws of the state of California on July 26, 1923, and its business is confined solely to, and is regulated solely by the laws of, the state of California. [Tr. 21.] The principal business written by the appellant is Workmen's Compensation Insurance and approximately fourteen-fifteenths of its net premium income during 1930 was from this source. [Tr. 22.] The balance of its premium income for 1930 was from automobile liability, collision and property damage insurance, and public liability and theft insurance. [Tr. 22.]

On its return for 1930, the appellant claimed a deduction of $882,632.55 for "losses incurred", determined as follows [Tr. 22]:

"Losses paid		$865,801.55
End (losses unpaid at end of 1930) 1930	$660,980.00	
End (losses unpaid at end of 1929) 1929	644,149 00	16,831.00
Losses Incurred		$882,632.55"

The amounts for "losses unpaid" at the end of 1929 and 1930, respectively, were determined as the result of a calculation based on the claims filed with the appellant and represented the sums which the company's examiner believed the appellant would be required to pay. [Tr. 38-39.]

With its income tax return, appellant filed a copy of a portion of its "Annual Statement for the Year Ending December 31, 1930, of the Condition and Affairs of the Pacific Employers Insurance Company" on the form "Miscellaneous Stock Companies—Convention Edition 1930." [Tr. 24-25.] Said statement was the "Annual Statement Approved by the National Convention of Insurance Commissioners" referred to in subparagraph (b) (1) of section 204, Revenue Act of 1928. [Tr. 25.]

On page 8 of said statement, the following facts and figures were set forth with respect to the premiums and losses for the year 1930 [Tr. 30]:

"Premiums

1.	Total premiums, per item 20, page 2	$1,598,789.27	
2.	Add unearned premiums and additional reserve December 31 of previous year, per item 8 of last year's exhibit	178,644.32	
3.	Total	$1,777,433.59	
4.	Deduct unearned premiums and additional reserve Dec. 31 of current year, per items 25 and 25½ page 5	170,936.00	
5.	Premiums earned during the year		$1,606,470.59

Losses

6.	Losses paid, per item 17, page 3	$ 872,735.74	
7.	Add salvage and reinsurance recoverable December 31 of previous year, per item 13 of last year's exhibit	12,489.31	
8.	Total		$885,225.05
9.	Deduct salvage and reinsurance recoverable December 31 of current year, per items (a) 42, page 4	19,423.50	
10.	Balance	$ 865,801.55	
11.	Add unpaid losses December 31 of current year, per item 19, page 5	596,532.85	
12.	Total		$1,462,334.40
13.	Deduct unpaid losses December 31 of previous year, per item 15 of last year's exhibit	440,318.52	
14.	Losses incurred during the year		$1,022,015.88

"

The items of unpaid losses appearing in said statement were computed in accordance with the provisions of section 602(a) of the Political Code of California, which law governs the business of petitioner. [Tr. 25-26.] The unpaid loss items set forth in said statement represent the highest aggregate reserve, after deduction for reinsurance, called for at the beginning and end of the taxable year by said law of the state of California and they represent sums actually held by appellant, as shown by the annual statement. [Tr. 26.]

Specification of Errors.

The appellant, in its petition for review [Tr. 45-46] made the following assignments of errors upon which it relies in this appeal:

1. The Board erred as a matter of law in ordering and deciding that there was a deficiency for the year 1930.

2. The Board erred as a matter of law in failing and refusing to determine that appellant had made an overpayment of $1,212.24 for the year 1930.

3. The Board erred in its decision and determination as a conclusion of law that appellant was not entitled to a deduction of $1,022,015.88 for "losses incurred" during the year 1930, as defined in section 204 (b), Revenue Act of 1928.

4. The Board erred in its decision and determination as a conclusion of law that the "unpaid losses" of appellant outstanding at the end of the preceding taxable year (1929), as defined in section 204 (b), Revenue Act of 1928, was not $440,318.52.

5. The Board erred in its decision and determination as a conclusion of law that the "unpaid losses" of appellant outstanding at the end of the taxable year 1930, as defined in section 204 (b), Revenue Act of 1928, was not $596,532.85.

6. The Board erred as a matter of law in its determination that the "losses incurred", as designated in section 204 (b) (4) and (6), Revenue Act of 1928, were not to be "computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners", as expressly provided in section 204 (b) (1), Revenue Act of 1928.

The fundamental issue in the case is whether the deduction for "losses incurred" is to be determined on the basis of the "underwriting exhibit", or whether it is to be determined on some other basis.

Statutes and Regulations.

Section 204, Revenue Act of 1928 (45 Stat. 844), provided as follows:

"SEC. 204. INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL

(a) *Imposition of tax.* In lieu of the tax imposed by section 13 of this title, there shall be levied, collected, and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company, 12 per centum of its net income;

(2) In the case of such a foreign insurance company, 12 per centum of its net income from sources within the United States.

(b) *Definition of income, etc.* In the case of an insurance company subject to the tax imposed by this section—

(1) *Gross income.* 'Gross income' means the sum of (A) the combined gross amount earned during the taxable year, from investment income and from underwriting income as provided in this subsection, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioner, and (B) gain during the taxable year from the sale or other disposition of property;

(2) *Net Income.* 'Net income' means the gross income as defined in paragraph (1) of this subsection less the deductions allowed by subsection (c) of this section.

(3) *Investment Income.* 'Investment income' means the gross amount of income earned during the taxable year from interest, dividends, and rents, computed as follows:

To all interest, dividends and rents received during the taxable year, add interest, dividends and rents due and accrued at the end of the taxable year, and deduct all interest, dividends and rents due and accrued at the end of the preceding taxable year;

(4) *Underwriting Income.* 'Underwriting income' means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred;

(5) *Premiums Earned.* 'Premiums earned on insurance contracts during the taxable year' means an amount computed as follows:

From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance. To the result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year;

(6) *Losses Incurred* 'Losses incurred' means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year;

(7) *Expenses Incurred.* 'Expenses incurred' means all expenses shown on annual statement approved by the National Convention of Insurance Commissioners, and shall be computed as follows:

To all expenses paid during the taxable year add expenses unpaid at the end of the taxable year and deduct expenses unpaid at the end of the preceding taxable year. For the purpose of computing the net income subject to the tax imposed by this section there shall be deducted from expenses incurred as defined in this paragraph all expenses incurred which are not allowed as deductions by subsection (c) of this section.

(c) *Deductions allowed.* In computing the net income of an insurance company subject to the tax imposed by this section there shall be allowed as deductions:

(1) All ordinary and necessary expenses incurred, as provided in section 23 (a);

(2) All interest as provided in section 23 (b);

(3) Taxes as provided in section 23 (c);

(4) Losses incurred as defined in subsection (b) (6) of this section;

(5) Losses sustained during the taxable year from the sale or other disposition of property;

(6) Bad debts in the nature of agency balances and bills receivable ascertained to be worthless and charged off within the taxable year;

(7) The amount received as dividends from corporations as provided in section 23 (p);

(8) The amount of interest earned during the taxable year which under section 22 (b) (4) is exempt from taxation under this title, and the amount of interest allowed as a credit under section 26;

(9) A reasonable allowance for the exhaustion, wear and tear of property, as provided in section 23 (k);

(10) In the case of such a domestic insurance company, the net income of which (computed without the benefit of this paragraph) is $25,000 or less, the sum of $3,000; but if the net income is more than $25,000 the tax imposed by this section shall not exceed the tax which would be payable if the $3,000 credit were allowed, plus the amount of the net income in excess of $25,000.

(d) *Deductions of foreign corporations.* In the case of a foreign corporation the deductions allowed in this section shall be allowed to the extent provided in Supplement I.

(e) *Double deductions.* Nothing in this section shall be construed to permit the same item to be twice deducted."

Article 992, Regulations 74, pertaining to the Revenue Act of 1928, provided as follows:

"*Art. 992. Gross income of insurance companies other than life or mutual.* Gross income as defined in section 204 (b) means the gross amount of income earned during the taxable year from interest, dividends, rents, and premium income, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners, as well as the gain derived from sale or other disposition of property. It does not include increase in liabilities during the year on account of reinsurance treaties, remittances from the home office of a foreign insurance company to the United States branch, borrowed money, gross increase due to adjustments in book value of capital assets, and premium on capital stock sold. The underwriting and investment exhibit is presumed clearly to reflect the true net income of the company, and in so far as it is not inconsistent with the provisions of the Act will be recognized and used as a basis for that purpose. All items of the exhibit, however, do not reflect an insurance company's income as defined in the Act. By reason of the definition of investment income, miscellaneous items which are intended to reflect surplus but do not properly enter into the computation of income, such as divi-

dends declared, home office remittances and receipts, and special deposits, are ignored. Gain or loss from agency balances and bills receivable not admitted as assets on the underwriting and investment exhibit will be ignored, excepting only such agency balances and bills receivable as have been charged off the books of the company as bad debts or, having been previously charged off, are recovered during the taxable year."

Section 602 (a), Political Code of California, provided as follows:

§ 602a. How Conditions of Company Shall Be Estimated. [Estimate of indebtedness of liability insurance companies.] In estimating the condition of any insurance corporation, mutual company, association, the state compensation insurance fund, interinsurance exchange or other insurance carriers engaged in the business of liability insurance and licensed to transact business in this state, the insurance commissioner shall charge as liabilities, all outstanding indebtedness of such carrier, and the premium reserve on policies in force equal to the unearned portions of the gross premiums charged for covering the risks, computed on each respective risk from the date of the issuance of the policy.

[Computation of reserve.] The reserve for outstanding losses under insurance against loss or damage from accident to or injuries suffered by an employee or other person and for which the insured is liable shall be computed as follows:

(1) [Liability suits.] For all liability suits being defended under policies written more than—

(a) Ten years prior to the date as of which the statement is made, one thousand five hundred dollars for each suit.

(b) Five and less than ten years prior to the date as of which the statement is made, one thousand dollars for each suit.

(c) Three years and less than five years prior to the date as of which the statement is made, eight hundred fifty dollars for each suit.

(2) [Liability policies.] For all liability policies written during the three years immediately preceding the date as of which the statement is made, such reserve shall be sixty per centum of the earned liability premiums of each of such three years less all loss and loss expense payments made under the liability policies written in the corresponding years; but in any event, such reserve shall, for the first of such three years, be not less than seven hundred fifty dollars for each outstanding liability suit on said year's policies.

(3) [Claims under policies written three years prior.] For all compensation claims under policies written more than three years prior to the date as of which the statement is made, the present value at four per centum interest of the determined and the estimated future payments.

(4) [Claims under policies written three years preceding.] For all compensation claims under policies written in the three years immediately preceding the date as of which the statement is made, such reserve shall be seventy per centum of the earned compensation premiums of each of such three years, less all loss and loss expense payments made in connection with such claims under policies writ-

ten in the corresponding years; but in any event in the case of the first year of any such three-year period such reserve shall be not less than the present value at four per centum interest of the determined and the estimated unpaid compensation claims under policies written during such year.

["Earned premiums."] The term "earned premiums," as used herein, shall include gross premiums charged on all policies written, including all determined excess and additional premiums, less return premiums, other than premiums returned to policyholders as dividends, and less reinsurance premiums and premiums on policies cancelled, and less unearned premiums on policies in force.

["Compensation."] The term "compensation" as used in this act, shall relate to all insurance effected by virtue of statutes providing compensation to employees for personal injuries irrespective of fault of the employer. The term "liability" shall relate to all insurance except compensation insurance against loss or damage from accident to or injuries suffered by an employee or other person and for which the insured is liable.

["Loss payments."] The terms "loss payments" and "loss expense payments," as used herein, shall include all payments to claimants, including payments for medical and surgical attendance, legal expenses, salaries and expenses of investigators, adjusters and field men, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employees, home office expenses, and all other payments made on account of claims, whether such payments shall be allocated to specific claims or unallocated.

[Distribution of unallocated liability loss expense payments.] All unallocated liability loss expense payments

made in a given calendar year subsequent to the first four years in which an insurer has been issuing liability policies, shall be distributed as follows: Thirty-five per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, ten per centum to the policies written in the second year preceding, ten per centum to the policies written in the third year preceding, and five per centum to the policies written in the fourth year preceding, and such payments made in each of the first four calendar years in which an insurer issues liability policies shall be distributed as follows: In the first calendar year one hundred per centum shall be charged to the policies written in that year, in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year; in the third calendar year forty per centum shall be charged to the policies written in that year, forty percentum to the policies written in the preceding year, and twenty per centum to the policies written in the second year preceding, and in the fourth calendar year thirty-five per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, fifteen per centum to the policies written in the second year preceding, and ten per centum to the policies written in the third year preceding, and a schedule showing such distribution shall be included in the annual statement.

[Distribution of unallocated compensation loss expense payment.] All unallocated compensation loss expense payments made in a given calendar year subsequent to the first three years in which an insurer has been issuing compensation policies shall be distributed as follows: Forty

per centum shall be charged to the policies written in that year, forty-five per centum to the policies written in the preceding year, ten per centum to the policies written in the second year preceding and five per centum to the policies written in the third year preceding, and such payments made in each of the first three calendar years in which an insurer issues compensation policies shall be distributed as follows: In the first calendar year one hundred per centum shall be charged to the policies written in that year, in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year, in the third calendar year forty-five per centum shall be charged to the policies written in that year, forty-five per centum to the policies written in the preceding year and ten per centum to the policies written in the second year preceding, and a schedule showing such distribution shall be included in the annual statement.

[Additional reserves.] Whenever, in the judgment of the insurance commissioner, the liability or compensation loss reserves of any insurer under his supervision, calculated in accordance with the foregoing provisions, are inadequate, he may, in his discretion, require such insurer to maintain additional reserves based upon estimated individual claims or otherwise.

[Schedule of experience.] Each insurer that writes liability or compensation policies shall include in the annual statement required by law a schedule of its experience thereunder in such form as the insurance commissioner may prescribe.

History: Amendment approved June 6, 1913, Stats. and Amdts. 1913, p. 493; amended May 26,

1917, Stats. and Amdts. 1917, p. 1178. In effect July 27, 1917.

Editorial Note: On June 6, 1913, two acts were passed amending § 602a, see Stats. and Amdts. 1913, pp. 465, 493, Kerr's Cumulative Supplement to Cyc. Codes of California, 1906-1913, pp. 65-70, and "editorial" note on pp. 67, 68. From a reading of the two amendments of 1903 it is manifest that the intention of the legislature was to amend the second of the acts passed on June 6, 1913, and which in "Kerr's Cumulative Supplement" and "Kerr's Small Codes of California," is designated as § 602[a]. In case of any doubt consult those works.

Summary of Argument.

Congress has enacted, beginning with the Revenue Act of 1921, special provisions for the taxation of insurance companies other than life or mutual. Section 204 of the Revenue Act of 1928, which governs the year 1930 here in question, contemplates and, we submit, expressly provides that "losses incurred", as pertaining to "underwriting income", shall be computed on the basis of underwriting and investment exhibit of the annual statement on the convention form. The deduction for "losses incurred", as claimed herein by appellant, is the exact amount reflected in said exhibit, whereas the deduction allowed by the respondent and the Board was computed on an entirely different basis.

The regulations and rulings of the Treasury Department have consistently recognized that the deduction for "losses incurred" must be computed on the basis of the underwriting exhibit.

ARGUMENT.

I.

The Law Clearly Provides That the Deduction for "Losses Incurred" Must Be Computed on the Basis of the Underwriting Exhibit, Rather Than on General Principles.

Under the Revenue Act of 1918, insurance companies were taxed as ordinary corporations, except that certain additional deductions were allowed to them. Under the 1921 Act an entirely new scheme was introduced for the taxation of insurance companies. Under this new scheme, three separate groups of insurance companies were recognized and a separate method of taxation was established as to each. With only minor changes this scheme has been followed in subsequent acts, including the Revenue Act of 1928. See 4 Paul and Mertens, Federal Income Taxation, 286 *et seq.*

The new provisions as to insurance companies were first inserted by the Senate in the draft of sections 246 and 247 of the 1921 Act and accepted by the House conferees with the following comments (Conference Report, No. 486, November 19, 1921, page 41):

> "Amendment No. 495: The House bill provided specifically that every insurance company not exempt under the provisions of section 231 shall make a return for the purposes of this act. As section 239 provides that corporations (including insurance companies) subject to taxation under Title II shall make returns, Senate amendment No. 495 strikes out the above provision of the House bill as surplusage and provides a new system of taxing insurance companies (other than life or mutual insurance companies). The

> Senate amendment defines the term 'gross income' of such companies to mean the combined gross amount earned during the taxable year from investment income and from underwriting income computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners. 'Expenses incurred' are defined to mean all expenses shown on the aforementioned annual statement approved by the National Convention of Insurance Commissioners; but for the purpose of computing taxable net income only those expenses specifically allowed may be deducted. The House recedes with an amendment making clerical changes."

The obvious purpose of making this change was to permit insurance companies to determine their taxable income substantially on the same basis as their records were required to be kept under the laws of the various states. Congress recognized that insurance companies (other than life or mutual) were required to file with the states in which they operated annual statements in a precise form established for the purpose of uniformity, by the National Convention of Insurance Commissioners. Accordingly, Congress expressly provided in section 204 (b) (1) of the 1928 Act (as in the corresponding Section 246 of the 1921 Act) that:

> " 'Gross income' means the sums of (A) the combined gross amount earned during the taxable year, from investment income and from *underwriting income* as provided in this subsection, *computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Con-*

> *vention of Insurance Commissioners* and (B) gain during the taxable year from the sale or other disposition of property". (Italics supplied throughout this brief.)

Under the above provision, it is clear that "underwriting income" must be computed on the basis of the underwriting exhibit of the annual statement. Subsection (b) (4) then provides that:

> " 'Underwriting income' means the premiums earned on insurance contracts during the taxable year less *losses incurred* and expenses incurred;"

Subsection (b) (6) defines the term "losses incurred" as follows:

> " 'Losses incurred' means losses incurred during the taxable year on insurance contracts, computed as follows:
>
> "To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained add all *unpaid losses* outstanding at the end of the taxable year and deduct *unpaid losses* outstanding at the end of the preceding taxable year;"

Similarly, subsection (b) (3) defines the term "investment income" and subsection (b) (5) defines the term "premiums paid." Thus there is in section 204 (b) a series of definitions, all of which relate back to the provision "computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners."

If these "losses incurred" were considered as in the nature of "expenses incurred" they would be governed by the provisions of subsection (b) (7) in part as follows:

> "'Expenses incurred' means all expenses shown on the annual statement approved by the National Convention of Insurance Commissioners * * *"

An examination of all the provisions of section 204 will demonstrate how carefully Congress provided that the taxable net income, in so far as it related to "underwriting and investment income" should follow the annual statement. The exceptions are as clearly stated in subsection (b) (1) (B) and subsection (c) of section 204. It will be noted that no exception was made with respect to "losses incurred."

That Congress in its draft of section 204 (b) was following very closely the terms and language used in the "underwriting and investment exhibit" form is apparent from a comparison of the statutory definition of "losses incurred" with the corresponding terms on the exhibit [Tr. 30], as follows:

Underwriting and Investment Exhibit	**Section 240 (b) (6)**
6. Losses paid, per item 17, page 3	"Losses paid during the taxable year"
7. Add salvage and reinsurance recoverable December 31 of previous year, per item 13 of last year's exhibit	"add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year"

9. Deduct salvage and reinsurance recoverable December 31 of current year, per items (a) . . . page 4	"deduct salvage and reinsurance recoverable outstanding at the end of the taxable year."
10. Balance	"To the result so obtained"
11. Add unpaid losses December 31 of current year, per item 19, page 5	"add all unpaid losses outstanding at the end of the taxable year."
13. Deduct unpaid losses December 31 of previous year, per item 15 of last year's exhibit	"deduct unpaid losses outstanding at the end of the preceding taxable year."
14. Losses incurred during the year	"Losses incurred"

It is difficult to see how Congress could have expressed more clearly its intention that the term "losses incurred" in the computation of an insurance company's "underwriting income" should be identical with the "losses incurred" as shown on the convention form of the company's annual statement. Where a statute employs terms which have an established meaning in a trade or business, it is reasonable to assume that the legislative body intended the adoption of that meaning; and this is particularly true where the law expressly refers to a form which uses the terms.

Congress, in establishing a special method of taxation of insurance companies, clearly intended that the "taxable income" from insurance sources should be synonymous with the "underwriting income" on the books of the companies as reflected in the annual statements made to the

insurance commissioners. The appellant herein was required by the state of California to keep its records and determine its "underwriting income" and "losses incurred" in a special manner. Congress has provided in section 204 that the "underwriting income" so computed should be the amount subjected to the tax.

The only authority cited in the Board's opinion is *Ocean Accident & Guarantee Corporation, Ltd. v. Commissioner,* 47 Fed. (2d) 582. However, that case arose under the 1918 Act which did not contain the provisions here in question. The primary issue there involved was whether a double deduction was allowable. A secondary question was whether the estimates were certain enough to justify an allowance. In that connection the court said in part:

> "This brings us to the question whether the deduction claimed by petitioner was an 'accrued' loss. It was an aggregate of estimates of policy losses likely to be suffered on account of all accidents or injuries reported to petitioner during the taxable year. As to some cases, the petitioner may have admitted liability in the amount of the estimate set up on its record card, and so might come within the terms of Article III of Regulations No. 45 as to a deductible loss under clause (4) of section 234 (a). But most of the estimates of liability were not of that character. Each one, viewed alone, would be too contingent as to payment and too uncertain as to amount to be deductible as a 'loss sustained.' Lucas v. Am. Code Co., 280 U. S. 445, 50 S. Ct. 202, 203, 74 L. Ed. 538. But the question is whether the aggregate of estimated unpaid losses for any year may not be taken as an aggregate of accrued losses, though each one separately, or at least most of them, would be contingent and unpredictable. The business of insurance pre-

> supposes that the insurer is able to treat as accurately computable and predictable an aggregate of variables no one of which is either computable or predictable. Without that the business must fail, and only past experience permits any estimate as to the extent to which the variations cancel each other. But the business does go on and with a certainty greater than most others. Here the accrued losses were predictable with remarkable accuracy, the business of petitioner being large enough to disregard the contingencies inherent in each loss taken alone. To assimilate such a situation to a single loss is, in our opinion, to close one's eyes to the substance of the business * * *"

Likewise in the present case the deductions for "unpaid losses" were estimated on the basis of past experience and were based on the aggregate, rather than individual losses. This method was required under the California law and, as recognized by the court in the quotation above, was fair and reasonable and truly reflected the annual income. It may be admitted that Congress *could* have required a stricter determination of each individual loss as it did for other types of corporations; the fact remains, however, that Congress preferred to tax insurance companies on the basis of their regular method of accounting, even though peculiar to that business.

Since the respondent has stipulated that upon the basis of the "underwriting and investment exhibit", the amount of "losses incurred" was $1,022,015.88 [Tr. 24-26] and the law expressly requires that exhibit to be followed, the Board clearly erred in allowing a lesser deduction computed under a method not prescribed in the law.

II.

The Regulations and Rulings of the Treasury Department Have Consistently Interpreted the Law as Contended for by Appellant Herein.

As set forth above, we believe the law is clear and unambiguous in requiring that the "underwriting and investment exhibit" be followed in the determination of the deduction for "losses incurred." However, if there were any ambiguity, it should be resolved in favor of the consistent interpretation of the Treasury Department to the same effect.

In the Revenue Acts of 1921, 1924, 1926 and 1928, Congress promulgated practically identical provisions for the taxation of "insurance companies other than life or mutual." Article 692, Regulations 62, in connection with the 1921 Act contained the express provision that:

> "The underwriting and investment exhibit is presumed clearly to reflect the true net income of the company, and in so far as it is not inconsistent with the provisions of the statute will be recognized and used as a basis for that purpose."

Identical statements are contained in Art. 692, Reg. 65 (1924 Act); Art. 692, Reg. 69 (1926 Act); and Art. 992, Reg. 74 (1928 Act).

Under these regulations the exhibit is presumed to reflect the true *net* income except to the extent inconsistent with the statute. The purpose of the exception is ex-

plained in the following sentences of the regulations, such as:

> "All items of the exhibit, however, do not reflect an insurance company's income as defined in the Act. By reason of the definition of investment income, miscellaneous items which are intended to reflect surplus but do not properly enter into the computation of income, such as dividends declared, home office remittances and receipts, and special deposits, are ignored."

However, in so far as the item of "losses incurred" is concerned, there is absolutely no inconsistency between the exhibit and the provisions of the statute.

We submit that the regulations represent a reasonable interpretation of the law and in view of the continued reenactment of the same provisions by Congress, that interpretation should prevail. See *Morrissey v. Commissioner,* 80 Law. ed. 245, 251; *Brewster v. Gage,* 280 U. S. 327.

Specific rulings by the Department likewise bear out this interpretation. In I. T. 2665, XI-2 C. B. 134, the Bureau issued the following ruling concerning the Revenue Act of 1921, 1924, 1926 and 1928, and particularly in connection with section 204 and article 992:

> "All insurance companies are *required* to use the highest aggregate reserve, after deduction for reinsurance placed with both authorized and unauthorized companies, called for at the beginning and end of the taxable year by any state in which they transact business, but the reserve must have been actually held as shown by the annual statement approved by the National Convention of Insurance Commissioners."

It will be noted that the above ruling is not permissive but mandatory. It is interesting to compare its requirements with the following statement in the stipulation of facts [Tr. 26]:

> "That Section 602 (a) of the Political Code of California is the law governing the business of petitioner and the unpaid loss items set forth in said Annual Statement (Exhibit 4) represent the highest Aggregate Reserve, after deduction for reinsurance, called for at the beginning and end of the taxable year by said law of said State of California. That said unpaid losses represent sums which have been actually held by petitioner, as shown by said Annual Statement (Exhibit 4)."

There can be no quesiton but that the deduction herein claimed was required to be used by the appellant, under I. T. 2665. Inasmuch as that ruling has never been revoked, it is impossible to reconcile the position taken by the Government in the instant case.

In G. C. M. 2318, VI-2 C. B. 80, the General Counsel had under consideration a question relating to the proper method of determining the allowance for "losses incurred" in the case of insurance companies. We consider this opinion so clear and convincing in its analysis of the law and the interpretation of the provisions here in question that we are reprinting it in *Appendix A*, herein. We believe a study of this General Counsel's opinion by this Court will remove any doubts which they might otherwise have on the question. After quoting the statutory definitions, the General Counsel said in part:

> "This definition of the term 'losses incurred' on the part of Congress is strongly indicative of an inten-

tion on its part to use the term in a sense different from that in which it is ordinarily used. Furthermore, a reference to the 'Underwriting exhibit' (page 10) of the annual statement of fire insurance companies, convention edition, will disclose that 'losses incurred' for the purposes of that statement are determined by the following computation:

* * * * * * * * *

"It will be noted that this computation follows exactly the computation provided by Congress (Sec. 246 (b) (6) *supra*) for determining 'losses incurred' under Section 246 (b) (4). It will also be noted that in item 21, *supra,* entitled 'Unpaid losses December 31, 1922' item 14, page 5, of the annual statement is incorporated by reference. A reference to this item will disclose that it carries the total of 'net unpaid claims' as of the close of the year and includes in that total the total of the two items 'losses incurred but not reported' and 'resisted losses.'

* * * * * * * * *

"It is fundamental that in construing a statute dealing with a particular trade or business it is to be presumed that terms used in such a statute are used in the sense that those terms are understood in trade or business with respect to which the statute was enacted when such terms have a meaning in that trade or business different from the commonly accepted meaning. In view of this rule of statutory construction and the intention of Congress, apparent from a reading of those paragraphs of section 246 hereinbefore quoted, as well as the uniform treatment among fire insurance companies of the items in ques-

> tion as shown by the annual statements of such companies, this office is of the opinion that 'losses incurred but not reported' and 'resisted losses' should be included in the computation of 'losses incurred' under section 246 (b) 4 of the Revenue Act of 1921 and the corresponding sections of subsequent Revenue Acts."

Thus, the regulations and published rulings of the Treasury Department recognize clearly the intention of Congress to follow the amounts shown on the underwriting exhibit of the annual statement of a company, with respect to such technical terms as "losses incurred" and "losses unpaid." We submit that this interpretation should be followed by this Court, for reasons stated by the Supreme Court in *McCaughn v. Hershey Chocolate Co.,* 283 U. S. 488, 492-3, in part as follows:

> "Such a construction of a doubtful or ambiguous statute by officials charged with its administration will not be judicially disturbed except for reasons of weight, which this record does not present. See Brewster v. Gage, 280 U. S. 327, 336; Universal Battery Co. v. United States, 281 U. S. 580, 583; Fawcus Mach. Co. v. United States, 282 U. S. 375, 378. The reenactment of the statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed. See *National Lead Co. v. United States,* 252 U. S. 140, 146. We see no reason for rejecting that construction."

Likewise, the record in the present case presents no "reasons of weight" justifying a reversal of the practical interpretation of these provisions by the Department.

Conclusion.

We respectfully submit that whether considered as an original question of interpreting the express provisions of the law or considered on the basis of the practical interpretation by the Treasury Department, the deduction for "losses incurred" must be computed on the basis of the underwriting exhibit of the annual statement, as contended by appellants. Accordingly, the Board's decision was erroneous and contrary to law, and should be reversed.

Respectfully,

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APPENDIX A.

SECTIONS 246 AND 247.

Article 693: Deductions allowed insurance companies. VI-49-3526 G. C. M. 2318

Revenue Acts of 1921, 1924, and 1926.

"Losses incurred but not reported" and "resisted losses" are not allowable as deductions under section 247 (a) 4 of the Revenue Acts of 1921, 1924, and 1926, but such items should be included in the computation of "losses incurred" under section 246 (b) of the Acts mentioned.

An opinion is requested whether "losses incurred but not reported" and "resisted losses" should be allowed fire insurance companies as a deduction under section 247 (a) 4 of the Revenue Acts of 1921, 1924, and 1926, or whether these items are to be included as "losses incurred" under section 246 (b) 4 of the Acts mentioned.

In consideration of the question it should be borne in mind that Congress has, in the Revenue Act of 1921, as well as in the subsequent Revenue Acts, made special provision for the taxation of insurance companies. With respect to insurance companies, other than life or mtual insurance companies, the taxes imposed by section 246 of the Revenue Act of 1921 and subsequent Revenue Acts are in lieu of the taxes imposed on other corporations by section 230 of those Acts. By section 246 (b), paragraphs 1 and 2, Congress has defined "gross income" and "net income" of insurance companies subject to tax under that section as follows:

(1) The term "gross income" means the combined gross amount, earned during the taxable year, from in-

vestment income and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners;

(2) The term "net income" means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247.

The succeeding paragraphs of section 246 (b) are devoted to the definition of various items entering into the computation of gross income as above defined. By section 246 (b), paragraphs 4 and 6, respectively, it is provided that:

(b) In the case of an insurance company subject to the tax imposed by this section—

(4) The term "underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred;

(6) The term "losses incurred" means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year.

This definition of the term "losses incurred" on the part of Congress is strongly indicative of an intention on its part to use the term in a sense different from that in

which it is ordinarily used. Furthermore, a reference to the "Underwriting exhibit" (page 10) of the annual statement of fire insurance companies, convention edition, will disclose that "losses incurred" for the purposes of that statement are determined by the following computation:

14. Losses paid, per item 13, page 3, * * *

15. Deduct salvage and reinsurance recoverable December 31, 1922, per items (a) 28, page 4, * * *

16. Balance, * * *

17. Add salvage and reinsurance recoverable December 31, 1921, per item 15, of last year's exhibit, * * *

18. Total, * * *

19. Deduct unpaid losses December 31, 1921, per item 21 of last year's exhibit, * * *

20. Balance, * * *

21. Add unpaid losses December 31, 1922, per item 14, page 5, * * *

22. Losses incurred during 1922, * * *

It will be noted that this computation follows exactly the computation provided by Congress (sec. 246 (b) 6, *supra*) for determining "losses incurred" under section 246 (b) 4. It will also be noted that in item 21, *supra*, entitled "Unpaid losses December 31, 1922," item 14, page 5, of the annual statement is incorporated by reference. A reference to this item will disclose that it carries the total of "net unpaid claims" as of the close of the year and includes in that total the total of the two items "losses incurred but not reported" and "resisted losses."

It thus becomes apparent that "losses incurred but not reported" and "unpaid losses" are uniformly included un-

der the head of "unpaid losses" in determining the total "losses incurred" in a given year for the purpose of the annual statement of fire companies as submitted to the insurance commissioners of the various States.

It is fundamental that in construing a statute dealing with a particular trade or business it is to be presumed that terms used in such a statute are used in the sense that those terms are understood in the trade or business with respect to which the statute was enacted when such terms have a meaning in that trade or business different from the commonly accepted meaning. In view of this rule of statutory construction and the intention of Congress, apparent from a reading of those paragraphs of section 246 hereinbefore quoted, as well as the uniform treatment among fire insurance companies of the items in question as shown by the annual statements of such companies, this office is of the opinion that "losses incurred but not reported" and "resisted losses" should be included in the computation of "losses incurred" under section 246 (b) 4 of the Revenue Act of 1921 and the corresponding sections of subsequent Revenue Acts.

The effect of this construction of the term "losses incurred" as used in section 246 (b) 4 is to exclude the items in question from the gross income of fire insurance companies subject to tax under section 246. Therefore, to permit these items to be deducted under section 247 (a) 4 in ascertaining the net income of such companies would be to permit the same item to be deducted twice contrary to the prohibition of section 247 (c). It necessarily follows that "losses incurred but not reported" and "resisted losses" should not be allowed as deductions under section 247 (a) 4.

No. 8166

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC EMPLOYERS INSURANCE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF ON BEHALF OF AMERICAN AUTOMOBILE INSURANCE COMPANY.

BERNHARD KNOLLENBERG, AMICUS CURIAE.

BERNHARD KNOLLENBERG,
Cunard Building, New York City, New York,
Amicus Curiae.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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IN THE

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BRIEF ON BEHALF OF AMERICAN AUTOMOBILE INSURANCE COMPANY.

BERNHARD KNOLLENBERG, AMICUS CURIAE.

The Petitioner is here, in effect, asserting the right to take as a deduction, in computing its net taxable income for 1930, a reserve for losses, computed in accordance with the statutory requirement of the State of California, without reference to whether this amount actually represents the best available estimate of what it will ultimately be called upon to pay on account of losses incurred but unpaid during its fiscal year ended December 31, 1930.

The Commissioner of Internal Revenue held that the petitioner was entitled to deduct only the amount

which it claimed as a deduction for losses in its original return, which deduction represented the aggregate of the estimates of losses submitted by the Company's Claim Examiners. The Board sustained the Commissioner's ruling.

We have no fault to find with this decision as such. The fact that the California law may require a certain reserve for losses has no bearing on the proper allowance for losses under the federal income tax law. The only evidence before the Commissioner and the Board as to the amount of losses incurred and unpaid at the close of the year 1930 was the amount computed by the Company's Claim Examiners; in fact, the Company stipulated the amount was correct. *Under these facts,* the Board properly declined to allow any larger deduction.

The Bureau of Internal Revenue has, however, interpreted the Board's decision and opinion in the present case as laying down an inflexible rule that the deductible losses of an insurance company, for federal income tax purposes, must be determined solely on the basis of the estimate of losses submitted by the Company's Claim Examiners.* This position, as we shall later show, is wholly unsound and we believe that the Board did not intend to establish or approve any such rule. But certain statements in the Board's opinion tend to give some basis for the Bureau's position, and the only way to avoid further confusion in the matter is for this Court to make clear, in its opinion on this

*This statement does not apply to life insurance companies or to mutual non-life companies. In the case of such companies, a wholly different method of computing the net taxable income is applicable.

appeal, that it does not recognize or approve the rule adopted by the Bureau.

The unsoundness of this rule will be apparent from a consideration of (1) the pertinent provisions of the federal tax statute; (2) the business facts in the light of which these statutory provisions were enacted, and (3) the decision of the United States Circuit Court of Appeals for the Second Circuit in *Ocean Accident & Guarantee Corporation, Ltd. v. Commissioner,* 47 F. (2d) 582 (1931).

---

1. STATUTORY PROVISIONS.

The provisions of the Revenue Act of 1928 (and corresponding provisions of subsequent Acts) are as follows:

> "Sec. 204. INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL.
>
> (a) Imposition of tax.—In lieu of the tax imposed by section 13 of this title, there shall be levied, collected, and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:
>
> * * * * * * *
>
> (c) Deductions allowed.—In computing the net income of an insurance company subject to the tax imposed by this section there shall be allowed as deductions:
>
> * * * * * * *
>
> (4) Losses incurred as defined in subsection (b) (6) of this section;
>
> * * * * * * *

(b) Definition of income, etc.—In the case of an insurance company subject to the tax imposed by this section——

* * * * * * *

(6) Losses Incurred.—'Losses incurred' means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained add all *unpaid losses outstanding at the end of the taxable year* and deduct unpaid losses outstanding at the end of the preceding taxable year." (Italics ours.)

It will be seen from the above that there is nothing in the statute which prescribes or intimates that the *"unpaid losses outstanding at the end of the taxable year"* to be allowed as an accrued deduction, shall be computed by any specific method. The natural inference is, therefore, that Congress intended that the accrual should be computed by such method as the Company has found by experience will produce the highest degree of accuracy, in line with the general rule that a taxpayer's account, for tax purposes, shall be kept in such manner as "to clearly reflect the income". (Sections 41 and 43 of the 1928 Act.) The Commissioner has no power to read into the law limitations which Congress itself has not imposed.

Morrill v. Jones, 106 U. S. 466.

2. THE BUSINESS FACTS IN THE LIGHT OF WHICH SECTION 204 WAS ENACTED.

If it were customary for insurance companies (other than life or mutual companies) to compute accrued losses by simply adding the estimates of losses submitted by the Company's Claim Examiners, there might be conceivable justification for the Bureau to read into the statute an implication that the deduction for unpaid losses must be computed in accordance with this customary practice. But the Bureau has never contended and could not contend that there is any such custom, because the fact is that, while the estimates of losses submitted by the Company's Claim Examiners may be given weight in arriving at the amount of losses to be accrued, the established practice is to take into account other data as well.

---

3. THE OCEAN ACCIDENT & GUARANTEE CORPORATION, LTD. CASE.

In its opinion, the Board, referring to the decision in the *Ocean* case (47 F. (2d) 582) said (Transcript of Record pp. 38-39):

> "The amount claimed in the return filed by the petitioner and allowed by the respondent was the result of a careful calculation based on the claims filed with it. An examiner investigated each claim, took into consideration a number of factors, listed in the stipulation, which might affect the amount of petitioner's liability and arrived at a sum that in his opinion the petitioner would be required to pay. These sums were totaled and the totals were listed by petitioner as the 'unpaid

> losses' and approved by the respondent. In a case analogous on the facts, but arising under the different statutory provisions of the Revenue Act of 1918, deductions for losses calculated as in this case were allowed as 'accrued but unpaid losses'. Ocean Accident & Guarantee Corporation, Ltd. v. Commissioner, 47 Fed. (2d) 582."

This statement in the Board's opinion is what the Bureau principally relies upon, in support of its contention that the deduction for unpaid losses is necessarily limited to the aggregate of the estimate of losses submitted by the Company's Claim Examiners. We submit that the decision in the *Ocean* case does not in the least tend to support the position that insurance companies must use one particular method, namely, a simple adding together of the estimates submitted by its Claim Examiners, in computing their allowable deductions for unpaid losses; but, on the contrary, supports a diametrically opposite conclusion. The facts, as set forth in the Court's preliminary statement of facts, and supplemented by a statement in its opinion, at page 583, are as follows:

> "When an accident or injury covered by such a policy is reported to the petitioner, its practice is to have an investigation thereof instituted by its claim department, as a result of which an estimate of the probable amount of liability under such policy is entered upon a record card. The estimates so set up are constantly revised as reports are received on individual cases, and the total of all such cases are summarized by the petitioner's statistical department. Petitioner's experience based on actual payments subsequently

made showed that the estimated amounts for alleged losses sustained but unpaid were within 1 7/40 per cent of being accurate."

* * * * * * *

"The dispute is whether the petitioner may also have a third deduction, namely, the estimated amount of its liability for policy losses accrued, but not paid, within the year; and, since subsequent experience proved that its estimates of accrued but unpaid losses were 1 7/40 per cent too high, petitioner has made a corresponding reduction in the amount of the deduction it is claiming for each of the years in question."

On the basis of these facts, the Court approved the Company's deduction for losses; saying (p. 585):

"The Board made no finding that the method employed did not reflect net income. On the contrary, it found that the method used by petitioner was generally used by casualty insurance companies to determine the amount of their losses in any year, and that the estimates kept by petitioner were considered necessary to determine its financial condition and to fix its premium rates. Experience showed the extraordinary accuracy of such estimates. Accordingly we think the Board erred in holding that the estimates of accrued but unpaid policy losses were too uncertain to be deductible under section 234(a)(10)."

It is evident from the above that the Court, far from holding that the estimates of the Claim Examiners must be regarded as the ultimate criterion for computing the accrued losses to be deducted, ex-

plicitly approved the Company's practice of adjusting the estimates of the Claim Examiners by reference to other data coming before its statistical department, and particularly by the Company's own experience record.

Assuming that it affirms the Board's decision, this Court can and will prevent a great amount of unnecessary confusion and expense by making clear, in its opinion in the present case, that the Revenue Act itself does not provide that the accrual for unpaid losses of insurance companies must be determined by any one method apart from the general rule that a taxpayer must keep his accounts in such manner as clearly to reflect his net income, and that this Court does not approve of the Board's opinion in the present case, in so far as that opinion is open to the construction that such losses must be computed exclusively on the basis of the reports submitted by the insurance companies' Claim Examiners.

Meaning of "Reserve".

In its opinion in this case, the Board said (Transcript of Record p. 38):

> "Thus, the amount now claimed by the petitioner appears to be essentially a reserve, which is not available to this type of insurance company as a deduction in computing net income."

The Bureau of Internal Revenue has interpreted this statement to mean that insurance companies other than life or mutual companies are not entitled to deduct any reserve, even a reserve for incurred but

unpaid losses. This interpretation of the Board's statement is clearly unsound as established by the fact that the so-called "accrued" losses which the Board itself approved in the present case were, strictly speaking, a "reserve", i. e., an *estimate* of the aggregate of unpaid losses as distinguished from the total of agreed or adjudicated losses still unpaid, which would be in the nature of accounts payable.

Presumably the Board merely intended to point out by its reference to reserves that companies of the type of Pacific Employers Insurance Company are not entitled to a deduction generally for "reserve funds required by law", within the meaning of Section 202(b) of the Revenue Act of 1934; additions to reserves of this type (including reserves for death or accidents in the future to those covered by insurance contracts in force at the close of the fiscal year) being deductible, under the terms of the statute, only by life insurance or mutual companies.

It would be instructive to the Bureau if this Court would take pains to point out in its opinion in the present case that this language could not have been intended to refer to all reserves and that certain reserves, namely, reserves for depreciation and reserves for incurred but unpaid losses are allowed by the statute as a deduction to insurance companies which are neither life nor mutual companies.

Dated, January 27, 1937.

Respectfully submitted,

BERNHARD KNOLLENBERG,

Amicus Curiae.

No. 8166

In the United States Circuit Court of Appeals for the Ninth Circuit

PACIFIC EMPLOYERS INSURANCE COMPANY,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISIONS OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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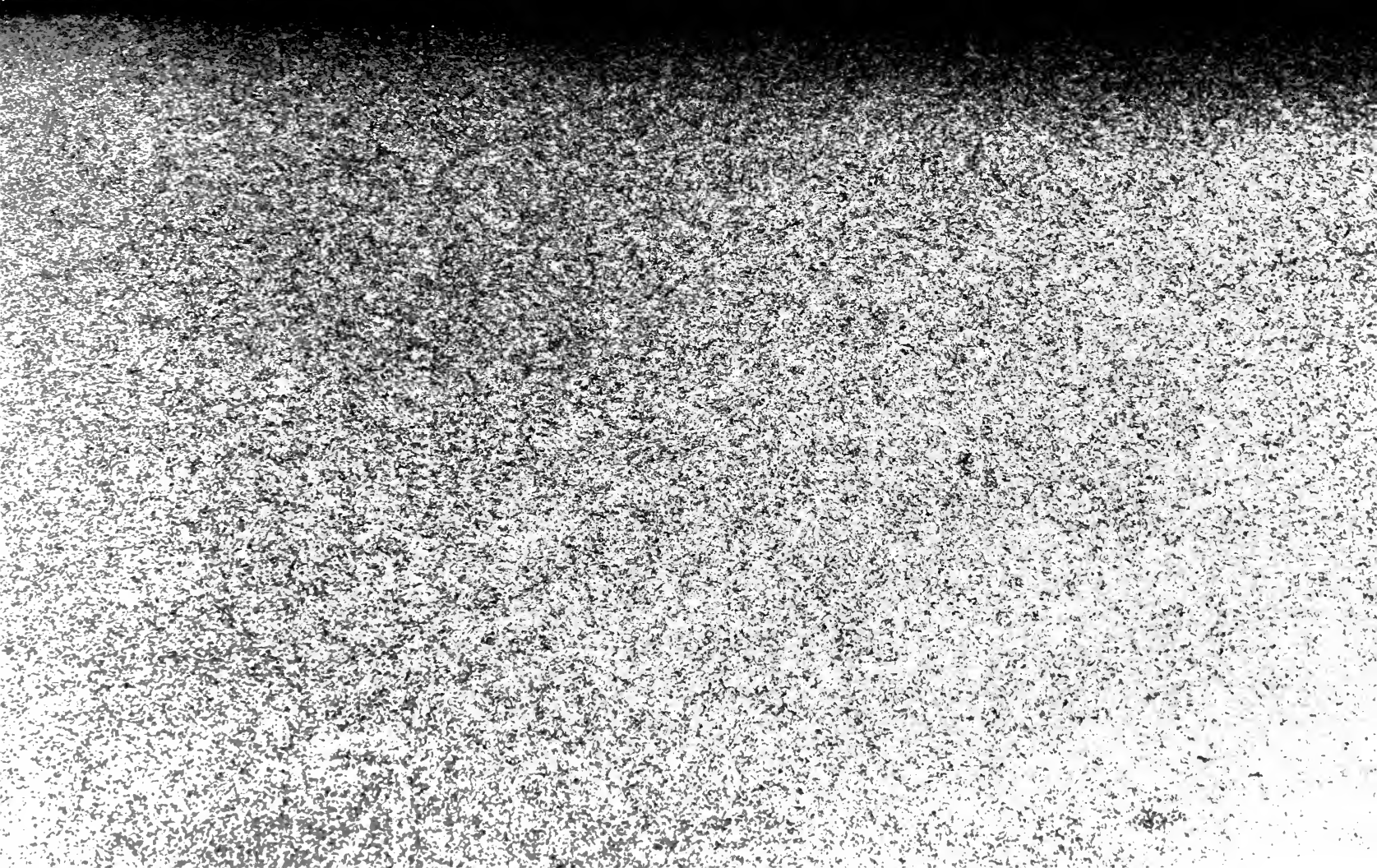

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ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 33–39), which is reported in 33 B. T. A. 501.

JURISDICTION

The petition for review involves a deficiency in income taxes for the year 1930 in the amount of $1,193.45 and is taken from a decision of the Board of Tax Appeals entered November 21, 1935 (R. 40).

The case is brought to this Court by a petition for review filed February 17, 1936 (R. 40–47), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286.

QUESTION PRESENTED

Whether the deduction permitted insurance companies OTHER THAN LIFE OR MUTUAL by Section 204 (c) of the Revenue Act of 1928, for "losses incurred" as defined by Section 204 (b) (6) of that Act, includes so-called reserves required to be maintained by state law on account of workmen's compensation and liability insurance contracts written.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the appendix, *infra,* pp. 20–30.

STATEMENT

The facts in the case were stipulated (R. 20–26), and as stipulated, were adopted by the Board of Tax Appeals as its findings of fact (R. 33).

So far as deemed material, the facts may be briefly stated as follows:

The petitioner is an insurance company other than life or mutual, organized under, and subject to, the laws of the State of California. Its business, which is confined solely to that State, is operated under a Certificate of Authority issued by the Insurance Commissioner of California (R. 21).

During the tax year 1930, approximately 14/15 of petitioner's net premium income was derived from workmen's compensation insurance; the balance was derived from automobile liability, collision, and property damage insurance, and from public liability and theft insurance (R. 22).

Petitioner, in making its income tax return for the calendar year 1930, claimed as a deduction for "losses incurred" the sum of $882,632.55 computed as follows (R. 22, VIII):

Losses paid		$865,801.55
End (losses unpaid at end of 1930) 1930	$660,980.00	
End (losses unpaid at end of 1929) 1929	644,149.00	16,831.00
Losses incurred		$882,632.55

It is undisputed that respondent allowed as a deduction from petitioner's gross income said item of $865,801.55 as "losses paid" plus the difference between "losses unpaid" of $660,980.00 at the end of the year 1930, and "losses unpaid" of $644,149.00, at the end of the year 1929, or $16,831.00 making the total deduction allowed for "losses incurred" $882,632.55.

This amount claimed by the petitioner as a deduction in its 1930 return and allowed by the respondent was the result of a careful examination based on claims actually filed with petitioner (R. 24).

Of the total of $660,980.00, above stated, the sum of $60,884.00 related to liability claims and the balance of $600,096.00 related to workmen's com-

pensation claims. Of the total of "losses unpaid" $644,149.00 at the end of 1929, the sum of $41,491.00 related to liability claims and the balance of $602,658.00 related to workmen's compensation claims (R. 22–23).

These "losses unpaid" at the end of the respective years 1929 and 1930 were determined from estimates made by petitioner's Claims Examiner as to the ultimate cost of the final adjustment of each outstanding claim. In making such estimates, the Claims Examiner took into consideration a number of elements which might affect the ultimate cost of adjustment, and the totals, as revised from time to time, represented the sums respectively claimed by petitioner in its 1930 return as "losses unpaid" at the end of the years 1929 and 1930 (R. 23–24).

At the time of filing its 1930 income tax return, petitioner attached thereto and filed therewith a copy of portions of its annual statement for the year 1930 as filed wih the Insurance Commissioner for the State of California on a form designated "Miscellaneous Stock Companies — Convention Edition 1930", approved by the National Convention of Insurance Commissioners referred to in subparagraph (b) (1) of Section 204 of the Revenue Act of 1928 (R. 24–25).

On page 8 of said annual statement (R. 30) is set forth petitioner's "Underwriting and Investment Exhibit" showing the sources of the increase and

decrease of petitioner's surplus during the year 1930. On line 10 of this exhibit (R. 30) is shown the item of $865,801.55 representing the deduction claimed by petitioner and allowed for "losses paid" during the year 1930. On line 11 thereof (R. 30) is shown an item of $596,532.85 described therein as "unpaid losses December 31 of current year, per item 19, page 5." On page 5 of the annual statement (R. 29) petitioner's "Liabilities" are set forth and said item 19 thereof shows "Total unpaid claims—$596,532.85" including—

Line 15 (6): Total net unpaid claims except liability and workmen's compensation claims (excluding expenses of investigation and adjustment)		$8,290.00
Line 16: Reserve for—		
Unpaid liability losses	$33,879.10	
and		
Workmen's Compensation losses	554,363.75	
		588,242.85
Total unpaid claims [end of 1930]		596,532.85

On line 13 of the "Underwriting and Investment Exhibit" (R. 30) is shown an item of $440,318.52 described therein as "unpaid losses December 31 of previous year [1929], per item 15 of last year's exhibit" which concededly was computed on the same basis as said item of $596,532.85.

It has been stipulated (R. 25, X) that said items $596,532.85 and $440,318.52, respectively, were computed in accordance with the provisions of Section 602 (a) of the Political Code of California, and represents the highest aggregate reserve, after deduction for reinsurance, called for at the beginning

and end of the taxable year (1930) by the laws of the State of California, and represents reserves actually held by petitioner at the beginning and end, respectively, of the year 1930.

Petitioner contended before the Board of Tax Appeals that it was entitled to deduct from its 1930 gross income under the provisions of Section 204 (c) (4) of the Revenue Act of 1928 as "losses incurred" the difference between said items of $596,532.85 and $440,318.52, or $156,214.33, on the ground that said items constituted, within the meaning of Section 204 (b) (6) of the Act "unpaid losses outstanding at the end of 1930" and "unpaid losses outstanding at the end of the preceding taxable year", respectively.

Respondent contended that said items constituted reserves for unpaid losses which petitioner, under the laws of California, was required to maintain and not "losses incurred" within the meaning of Section 204 (c) (4) of the Revenue Act of 1928. The Board of Tax Appeals sustained respondent's position and held that insurance companies other than life or mutual, writing workmen's compensation and liability insurance, may not take as a deduction for "unpaid losses" a reserve based on the amount of the company's earned workmen's compensation and liability insurance premiums.

The case is here upon the petitioner's petition for review.

SUMMARY OF ARGUMENT

Insurance companies other than life or mutual may not deduct, under the provisions of Section 204 (c) (4) of the Revenue Act of 1928, as "losses incurred" the net additions made during the year to so-called reserves required by state law on account of liability and workmen's compensation insurance contracts written.

Prior to the enactment of the Revenue Act of 1921, insurance companies were permitted to deduct from gross income "the net addition, if any, to reserve funds required by law." That deduction was eliminated by Congress in the case of insurance companies other than life or mutual in the Revenue Act of 1921 and in all subsequent Revenue Acts. Nowhere in the Revenue Act of 1928 is there any provision for the deduction of any reserve in the case of companies of the type here in question.

The statutory provision for the use of the underwriting and investment exhibit referred to in Section 204 (b) (1) of the 1928 Act is limited to the determination of gross income. It is not referred to either directly or indirectly in the provisions of Section 204 (c) of the Act and it is therefore not essential in the determination of a deduction for "losses incurred" provided by Section 204 (c) (4) of the Act.

The deductions granted by respondent in this case for "losses incurred" are in accord with the

statute and the regulations and rulings promulgated thereunder by respondent.

ARGUMENT

I

THE DEDUCTION PERMITTED INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL BY SECTION 204 (c) (4) OF THE REVENUE ACT OF 1928, FOR "LOSSES INCURRED", AS DEFINED BY SECTION 204 (b) (6) OF THE ACT DOES NOT INCLUDE SO-CALLED RESERVES REQUIRED TO BE MAINTAINED BY STATE LAW ON ACCOUNT OF WORKMEN'S COMPENSATION AND LIABILITY INSURANCE CONTRACTS WRITTEN

Since petitioner is neither a life nor a mutual insurance company it is taxable for the year 1930 as an insurance company other than life or mutual under the provisions of Section 204 of the Revenue Act of 1928, *infra*, p. 20.

That Act specifically defines the gross and net income of the type of insurance companies taxable thereunder, as well as the meaning of the terms "underwriting income", "premiums earned", "expenses incurred", "losses incurred", etc.

The deduction here in controversy is granted by Congress in Section 204 (c) (4), reading as follows:

> (c) *Deductions allowed.*—In computing the net income of an insurance company subject to the tax imposed by this section there shall be allowed as deductions:
>
> * * * (4) Losses incurred as defined in subsection (b) (6) of this section; * * *.

The meaning of the term "losses incurred" is defined in subsection (b) (6) as follows:

(b) *Definition of income, etc.*—In the case of an insurance company subject to the tax imposed by this section—

* * * (6) LOSSES INCURRED.—"Losses incurred" means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year; * * *.

Petitioner, in making its 1930 income tax return, claimed, and was granted, as a deduction for "losses incurred", a total of $882,632.55 made up of losses actually paid during the year amounting to the sum of $865,801.55 plus the sum of $16,831.00, representing the difference between the sum of $644,149.00 and the sum of $660,980.00 claimed by petitioner as "losses unpaid" at the end of the respective years 1929 and 1930 (R. 22, VIII).

It has been stipulated that the above "losses unpaid" were computed upon claims *actually filed* with petitioner and upon the basis of estimates "of the ultimate cost of final adjustment of each outstanding unadjusted claim made by a Claim

Examiner", the total, as revised from time to time, being the sum of such estimates on each such claim (R. 22–24).

The deductions granted by respondent were computed upon the basis of losses actually paid during the year 1930 and upon the basis of "losses unpaid" upon claims actually accrued and outstanding at the end of the respective years 1929 and 1930, and they were therefore properly allowed by respondent. See *Ocean Accident & G. Corp.* v. *Commissioner,* 47 F. (2d) 582 (C. C. A. 2d).

We come now to the sole controversy in this case, i. e., petitioner's contention that it is entitled to include in the deduction for "losses incurred" as "losses unpaid" the net addition to reserves held by petitioner at the beginning and end of the year 1930 in the respective amounts of $440,318.52 and $596,532.85 (R. 26, XI).

These so-called reserves were admittedly required to be held by petitioner, and were computed, under the provisions of Section 602 of the Political Code of California, *infra*, p. 25, and represented, respectively, "the highest Aggregate Reserve, after deduction for reinsurance, called for at the beginning and end of the taxable year by said law of said State of California" (R. 25–26).

Petitioner would thus include in the deduction for "losses incurred" granted by Section 204 (c) (4) of the Act, the difference being its reserves for

so-called unpaid losses held at the beginning and end of the year 1930, or the sum of $156,214.33, and would thereby increase the deduction for "losses incurred" during the year 1930 from the sum of $882,632.55, claimed in its 1930 return and allowed by respondent, to the sum of $1,022,015.88 (R. 26), or a net increase in the deduction for "losses incurred" of $139,383.33.

It is undisputed that petitioner's so-called reserves were computed under the provisions of said Section 602 (a) of the Political Code of California upon the basis of earned premiums not only for the tax year 1930, but also for prior years, on its liability and workmen's compensation insurance contracts written and outstanding. See supporting schedules (R. 31–32).

It is established that the income tax laws require, unless otherwise specifically provided by statute, that the net income of a taxpayer for each year must stand by itself. *Burnet* v. *Sanford & Brooks Co.,* 282 U. S. 359.

Here it clearly appears that petitioner's so-called reserves are based upon average earned premiums of several years and not upon the basis of earned premiums for the tax year 1930. If petitioner were permitted to change the method of computing "unpaid losses" from the actual outstanding accrued loss method reflected in its 1930 return to the average reserve method for which it is now contending, a distortion of petitioner's true taxable

net income for the tax year 1930 would, we submit, inevitably result, contrary to the principles announced by the Supreme Court in the *Sanford & Brooks Co.* case, *supra.*

(a) *A taxpayer is not entitled as a matter of right to any deductions from gross come.*

It has been established by repeated decisions of the Supreme Court that a taxpayer is not entitled as a matter of right to any deductions from gross income but may claim only such deductions as are specifically authorized by statute. *Burnet* v. *Thompson Oil & G. Co.,* 283 U. S. 301; *Helvering* v. *Inter-Mountain Insurance Co.,* 294 U. S. 686; *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364.

The deductions from gross income granted by Congress to insurance companies other than life or mutual by the Revenue Act of 1928 are listed in detail in Section 204 (c), subparagraphs 1 to 10, inclusive, *infra.* There are no provisions therein contained for the deduction by such companies of an insurance reserve of any kind.

This is particularly significant since, in the preceding Section 203, pertaining to life companies, as well as in the succeeding Section 208, pertaining to mutual insurance companies, there are expressly set forth provisions for the deduction of reserve funds required by law in the case of these companies. The omission was deliberate. Prior to the enactment of the Revenue Act of 1921, all in-

surance companies were permitted to deduct from gross income "the net addition, if any, to reserve funds required by law."[1] That deduction was eliminated by Congress, however, in the case of insurance companies other than life or mutual in the Revenue Act of 1921 and in all subsequent Revenue Acts. Nowhere in the Revenue Act of 1928, as already stated, is there any provision for the deduction of any reserve in the case of companies of the type here in question, in view of which, the deduction now claimed by petitioner must be denied even though the amounts held by petitioner at the beginning and end of the tax year 1930 are required to be held as so-called reserves under the laws of the State of California. *American Title Co.* v. *Commissioner,* 76 F. (2d) 332, 333 (C. C. A. 3d); *Ocean Accident & G. Corp.* v. *Commissioner, supra;* compare *United States* v. *Boston Insurance Co.,* 269 U. S. 197.

II

THERE IS NO PROVISION IN THE STATUTE REQUIRING THAT THE DEDUCTIONS GRANTED BY CONGRESS IN SECTION 204 (C) SHALL BE COMPUTED ON THE BASIS OF THE UNDERWRITING AND INVESTMENT EXHIBIT OF THE ANNUAL STATEMENT APPROVED BY THE NATIONAL CONVENTION OF INSURANCE COMMISSIONERS

Petitioner contends (Br. 20–26) that since the deduction for "losses incurred" as defined by Sec-

[1] Act of August 5, 1909, c. 6, 36 Stat. 11, 113, Sec. 38 (Second); Act of October 3, 1913, c. 16, 38 Stat. 114, 172–173, Sec. II G (b) (Second); Revenue Act of 1916, c. 463, 39 Stat. 756, 767–768, Sec. 12 (a) (Second) (c); Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077–1079, Sec. 234 (a) (10).

tion 204 (b) (6), *supra,* includes "unpaid losses", such "unpaid losses" must be computed on the basis of the underwriting and investment exhibit (R. 30) attached to its annual statement (Convention Edition) to the Insurance Commissioner of the State of California. Petitioner's contention is based upon the fact that Section 204 (b) (1) of the Act, *infra,* p. 20, provides that the gross income of an insurance company other than life or mutual is to be "computed on basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners" and from this it is argued that the deduction for "losses incurred" including "unpaid losses" must be computed on the same basis.

In this connection, the attention of the Court is invited to the following statement made by the petitioner (Br. 26):

> Since the respondent has stipulated that upon the basis of the "underwriting and investment exhibit", the amount of "losses incurred" was $1,022,015.88 [Tr. 24–26] and the law expressly requires that exhibit to be followed, the Board clearly erred in allowing a lesser deduction computed under a method prescribed in the law.

No such concession, as disclosed by the record herein, was ever made by respondent and, we submit, that no such concession can be drawn from

the facts stipulated at pages 24 to 26 of the record as contended by petitioner.

All that was stipulated was that the exhibits in evidence (R. 27–32) were correct copies of petitioners' annual statement to the Insurance Commissioner of California on forms approved by the National Convention of Insurance Commissioners referred to in said subparagraph (b) (1) of Section 204. The inference which petitioner seeks to convey is, we submit, wholly unwarranted by the facts stipulated.

It is respondent's position that the statutory provision for the use of the underwriting and investment exhibit referred to in said Section 204 (b) (1) is limited to the determination of petitioner's gross income. It is not referred to either directly or indirectly in the provisions of Section 204 (c) of the Act and is therefore not essential, we submit, in the determination of the deduction for "losses incurred" provided by Section 204 (c) (4), *supra.*

In the case of *Home Title Ins. Co.* v. *United States,* 50 F. (2d) 107 (C. C. A. 2d), the Government contended, under the corresponding provisions of Section 246 (b) (1) of the Revenue Acts of 1921 and 1924, that since the National Convention of Insurance Commissioners had not approved a form for an underwriting and investment exhibit in the case of title insurance companies, Congress must have intended to tax such companies as ordinary corporations and not as insur-

ance companies other than life or mutual. In disposing of the Government's contention, the court said (p. 111):

> Although section 246 (b) (1) refers to the form of annual statement approved by the National Convention of Insurance Commissioners, other subdivisions of the section proceed to specify how gross and net income are to be computed, so that the absence of such an approved form of annual statement would seem unimportant. See *Massachusetts Protective Ass'n* v. *Commissioner,* 18 B. T. A. 810; *Western Casualty Co.* v. *Commissioner,* 20 B. T. A. 738.

See also, *American Title Co.* v. *Commissioner,* 29 B. T. A. 479, 480.

In addition to the above, there is, however, another complete answer to petitioner's contention that its underwriting and investment exhibit is controlling here as to the amount of "unpaid losses" shown thereon in lines 11 and 13, respectively (R. 30). It is true that said items of $596,532.85 and $440,318.52 here in controversy are shown on said underwriting and investment exhibit as "unpaid losses", but reference to item 19, page 5 (R. 29) referred to in line 11 will show that the item of $596,532.85 is, in fact, the reserve which petitioner is required to compute and maintain under the provisions of said Section 602 (a) of the Political Code of California.

It is not disputed that the item of $440,318.52 was precisely the same character.

It is clear, we submit, that petitioner is here seeking a deduction based not upon "unpaid losses" accrued and outstanding at the beginning and end of the year 1930, but a deduction for the net addition to the reserve funds which it was required to hold at the beginning and end of the tax year 1930 under the laws of the State of California, a deduction to which it is clearly not entitled under the provisions of the Revenue Act of 1928. *American Title Co.* v. *Commissioner,* 76 F. (2d) 332, 333, *supra.*

III

THE DEDUCTIONS GRANTED BY RESPONDENT IN THIS CASE FOR "LOSSES INCURRED" ARE IN ACCORD WITH THE STATUTE AND WITH THE REGULATIONS AND RULINGS PROMULGATED THEREUNDER BY RESPONDENT

Petitioner contends (Br. 27–31) that the regulations and rulings of the respondent have consistently interpreted the law as requiring the computation of "losses incurred" including "unpaid losses" upon the basis of the underwriting and investment exhibit set forth in the form approved by the National Convention of Insurance Commissioners commonly referred to as the "Convention Edition."

We have already pointed out, however, that the presence or absence of such underwriting and investment exhibit is not controlling in the computation of the net income of an insurance company other than life or mutual. *Home Title Ins. Co.* v. *United States, supra; America Title Co.* v. *Commissioner,* 29 B. T. A. 479, *supra.*

It is true that Article 692 of Regulations 62, promulgated in connection with the 1921 Act contained the express provision that "the underwriting and investment exhibit is presumed clearly to reflect the true net income of the company and in so far as it is not inconsistent with the provisions of the statute will be recognized and used as a basis for that purpose."

It is also true that this identical provision was carried forward as Article 692 of Regulations 65 and 69, promulgated under the provisions of the respective Revenue Acts of 1924 and 1926, and as Article 992 of Regulations 74 pertaining to the Revenue Act of 1928, *infra*, p. 20, but it will be noted that the underwriting and investment exhibit is presumed to reflect the true net income only in so far as it is not inconsistent with the provisions of the statute.

The statute here, as we have already shown, does not permit petitioner to deduct from its 1930 gross income the net addition to its reserve funds required by the laws of the State of California and must therefore be held to overcome any presumption that said underwriting and investment exhibit reflects petitioner's true net income.

Petitioner relies upon G. C. M. 2318, VI–2 Cumulative Bulletin 80, set forth in petitioner's brief as Appendix A. It will be noted that that opinion deals with the deductions claimed by a fire insurance company for "losses incurred but not re-

ported" and "resisted losses." Clearly, "losses incurred but not reported" constitute accrued liabilities of the company and as such they were clearly deductible as "losses incurred." Compare *New York Life Ins. Co.* v. *Edwards,* 271 U. S. 109, 119. Clearly, also, "resisted losses" also constituted accrued liabilities of the company and as such they were likewise deductible as "losses incurred." *Ocean Accident & G. Corp.* v. *Commissioner, supra.*

The items which petitioner is here seeking to include as "unpaid losses", however, were not *accrued losses* but, as stipulated (R. 26), represented "the highest Aggregate Reserve, after deduction for reinsurance, called for at the beginning and end of the taxable year by said law of said State of California." As such, no part thereof constituted deductible "losses incurred" within the meaning of the Revenue Act of 1928.

CONCLUSION

It is respectfully submitted that the decision of the Board of Tax Appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1936.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 204. INSURANCE COMPANIES OTHER THAN LIFE OR MUTUAL.—

(a) *Imposition of tax.*—In lieu of the tax imposed by section 13 of this title, there shall be levied, collected, and paid for each taxable year upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

(1) In the case of such a domestic insurance company, 12 per centum of its net income;

(2) In the case of such a foreign insurance company, 12 per centum of its net income from sources within the United States.

(b) *Definition of income, etc.*—In the case of an insurance company subject to the tax imposed by this section—

(1) GROSS INCOME.—"Gross income" means the sum of (A) the combined gross amount earned during the taxable year, from investment income and from underwriting income as provided in this subsection, computed on the bases of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners, and (B) gain during the taxable year from the sale or other disposition of property;

(2) NET INCOME.—"Net income" means the gross income as defined in paragraph (1) of this subsection less the deductions allowed by subsection (c) of this section.

(3) INVESTMENT INCOME.—"Investment income" means the gross amount of income

earned during the taxable year from interest, dividends, and rents, computed as follows:

To all interest, dividends, and rents received during the taxable year, add interest, dividends, and rents due and accrued at the end of the taxable year, and deduct all of interest, dividends, and rents due and accrued at the end of the preceding taxable year;

(4) UNDERWRITING INCOME.—"Underwriting income" means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred;

(5) PREMIUMS EARNED.—"Premiums earned on insurance contracts during the taxable year" means an amount computed as follows:

From the amount of gross premiums written on insurance contracts during the taxable year, deduct return premiums and premiums paid for reinsurance. To this result so obtained add unearned premiums on outstanding business at the end of the preceding taxable year and deduct unearned premiums on outstanding business at the end of the taxable year;

(6) LOSSES INCURRED.—"Losses incurred" means losses incurred during the taxable year on insurance contracts, computed as follows:

To losses paid during the taxable year, add salvage and reinsurance recoverable outstanding at the end of the preceding taxable year, and deduct salvage and reinsurance recoverable outstanding at the end of the taxable year. To the result so obtained add all unpaid losses outstanding at the end of the taxable year and deduct unpaid losses outstanding at the end of the preceding taxable year;

(7) EXPENSES INCURRED.—"Expenses incurred" means all expenses shown on the annual statement approved by the National Convention of Insurance Commissioners, and shall be computed as follows:

To all expenses paid during the taxable year add expenses unpaid at the end of the taxable year and deduct expenses unpaid at the end of the preceding taxable year. For the purpose of computing the net income subject to the tax imposed by this section there shall be deducted from expenses incurred as defined in this paragraph all expenses incurred which are not allowed as deductions by subsection (c) of this section.

(c) *Deductions allowed.*—In computing the net income of an insurance company subject to the tax imposed by this section there shall be allowed as deductions:

(1) All ordinary and necessary expenses incurred, as provided in section 23 (a);

(2) All interest as provided in section 23 (b);

(3) Taxes as provided in section 23 (c);

(4) Losses incurred as defined in subsection (b) (6) of this section;

(5) Losses sustained during the taxable year from the sale or other disposition of property;

(6) Bad debts in the nature of agency balances and bills receivable ascertained to be worthless and charged off within the taxable year;

(7) The amount received as dividends from corporations as provided in section 23 (p);

(8) The amount of interest earned during the taxable year which under section 22 (b) (4) is exempt from taxation under

this title, and the amount of interest allowed as a credit under section 26;

(9) A reasonable allowance for the exhaustion, wear and tear of property, as provided in section 23 (k);

(10) In the case of such a domestic insurance company, the net income of which (computed without the benefit of this paragraph) is $25,000 or less, the sum of $3,000; but if the net income is more than $25,000 the tax imposed by this section shall not exceed the tax which would be payable if the $3,000 credit were allowed, plus the amount of the net income in excess of $25,000.

(d) *Deductions of foreign corporations.*—In the case of a foreign corporation the deductions allowed in this section shall be allowed to the extent provided in Supplement I.

(e) *Double deductions.*—Nothing in this section shall be construed to permit the same item to be twice deducted.

Regulations 74, promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, in accordance with the provisions of the Revenue Act of 1928, provides by Articles 991, 992, and 993 as follows:

ART. 991. *Tax on insurance companies other than life or mutual.*—For the calendar year 1928 and subsequent years all insurance companies (other than life or mutual companies) are subject to the tax imposed by section 204. Mutual insurance companies (other than life) remain subject to the tax imposed by section 13. The term "insurance companies" as used in this article and in articles 992 and 993 means only those companies subject to the tax imposed by section 204. The rate of the tax imposed by section

204 is 12 per cent, and the net income upon which the tax is imposed, as defined in section 204, differs from the net income of other corporations. Insurance companies are entitled to the benefit of section 117 (net losses) but not of section 101 (capital gains and losses). All provisions of the Act and of these regulations not inconsistent with the specific provisions of section 204 are applicable to the assessment and collection of this tax, and insurance companies are subject to the same penalties as provided in the case of returns and payment of income tax by other corporations. Since section 204 provides that the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners shall be the basis for computing gross income and since the annual statement is rendered on the calendar year basis, the first returns under section 204 will be for the taxable year ending December 31, 1928.

ART. 992. *Gross income of insurance companies other than life or mutual.*—Gross income as defined in section 204 (b) means the gross amount of income earned during the taxable year from interest, dividends, rents, and premium income, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners, as well as the gain derived from sale or other disposition of property. It does not include increase in liabilities during the year on account of reinsurance treaties, remittances from the home office of a foreign insurance company to the United States branch, borrowed money, gross increase due to adjustments

in book value of capital assets, and premium on capital stock sold. The underwriting and investment exhibit is presumed clearly to reflect the true net income of the company, and in so far as it is not inconsistent with the provisions of the Act will be recognized and used as a basis for that purpose. All items of the exhibit, however, do not reflect an insurance company's income as defined in the Act. By reason of the definition of investment income, miscellaneous items which are intended to reflect surplus but do not properly enter into the computation of income, such as dividends declared, home office remittances and receipts, and special deposits, are ignored. Gain or loss from agency balances and bills receivable not admitted as assets on the underwriting and investment exhibit will be ignored, excepting only such agency balances and bills receivable as have been charged off the books of the company as bad debts or, having been previously charged off, are recovered during the taxable year.

ART. 993. *Deductions allowed insurance companies other than life or mutual.*—The deductions allowable are specified in section 204, and include losses sustained from the sale or other disposition of property. * * *

Political Code of California, Title I, Chapter 3, Part III, Article 16, Section 602 (a):

602 (a). *Liabilities of Insurance companies.—Computation of reserve.*—In estimating the condition of any insurance corporation, mutual company, association, the state compensation insurance fund, inter-insurance exchange, or other insurance carriers engaged in the business of liability insurance and licensed to transact business

in this state, the insurance commissioner shall charge as liabilities, all outstanding indebtedness of such carrier, and the premium reserve on policies in force, equal to the unearned portions of the gross premiums charged for covering the risks, computed on each respective risk from the date of the issuance of the policy.

The reserve for outstanding losses under insurance against loss or damage from accident to or injuries suffered by an employee or other person and for which the insured is liable shall be computed as follows:

(1) *Liability suits.*—For all liability suits being defended under policies written more than—

(a) Ten years prior to the date as of which the statement is made, one thousand five hundred dollars for each suit.

(b) Five and less than ten years prior to the date as of which the statement is made, one thousand dollars for each suit.

(c) Three and less than five years prior to the date as of which the statement is made, eight hundred fifty dollars for each suit.

(2) *Liability policies.—For all liability policies* written during the three years immediately preceding the date as of which the statement is made, *such reserve shall be sixty per centum of the earned liability premiums of each of such three years less all loss and loss expense payments made under the liability policies written in the corresponding years;* but in any event, such reserve shall for the first of such three years, be not less than seven hundred fifty dollars for each outstanding liability suit on said year's policies.

(3) *Claims under policies written three years prior.*—For all compensation claims under policies written more than three years prior to the date as of which the statement is made, the present values at four per centum interest of the determined and the estimated future payments.

(4) *Claims under policies written three years preceding.—For all compensation claims* under policies written in the three years immediately preceding the date as of which the statement is made, *such reserve shall be seventy per centum of the earned compensation premiums of each of such three years, less all loss and loss expense payments made in connection with such claims under policies written in the corresponding years;* but in any event in the case of the first year of any such three-year period such reserve shall be not less than the present value at four per centum interest of the determined and the estimated unpaid compensation claims under policies written during such year.

"*Earned premiums.*"—The term "earned premiums", as used herein, shall include gross premiums charged on all policies written, including all determined excess and additional premiums, less return premiums, other than premiums returned to policyholders as dividends, and less reinsurance premiums and premiums on policies canceled, and less unearned premiums on policies in force.

"*Compensation.*"—The term "compensation" as used in this act shall relate to all insurance effected by virtue of statutes providing compensation to employees for personal injuries irrespective of fault of the employer. The term "liability" shall relate to all insurance except compensation insur-

ance against loss or damage from accident to or injuries suffered by an employee or other person and for which the insured is liable.

"*Loss payments.*"—The terms "loss payments", and "loss expense payments", as used herein, shall include all payments to claimants, including payments for medical and surgical attendance, legal expenses, salaries, and expenses of investigators, adjusters and field men, rents, stationery, telegraph and telephone charges, postage, salaries and expenses of office employees, home office expenses, and all other payments made on account of claims, whether such payments shall be allocated to specific claims or unallocated.

Distribution of unallocated liability loss expense payments.—All unallocated liability loss expense payments made in a given calendar year subsequent to the first four years in which an insurer has been issuing liability policies, shall be distributed as follows: Thirty-five per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, ten per centum to the policies written in the second year preceding, ten per centum to the policies written in the third year preceding, and five per centum to the policies written in the fourth year preceding, and such payments made in each of the first four calendar years in which an insurer issues liability policies shall be distributed as follows: In the first calendar year one hundred per centum shall be charged to the policies written in that year, in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year; in the third

calendar year forty per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, and twenty per centum to the policies written in the second year preceding, and in the fourth calendar year thirty-five per centum shall be charged to the policies written in that year, forty per centum to the policies written in the preceding year, fifteen per centum to the policies written in the second year preceding, and ten per centum to the policies written in the third year preceding, and a schedule showing such distribution shall be included in the annual statement.

Distribution of unallocated compensation loss expense payments.—All unallocated compensation loss expense payments made in a given calendar year subsequent to the first three years in which an insurer has been issuing compensation policies shall be distributed as follows: Forty per centum shall be charged to the policies written in that year, forty-five per centum to the policies written in the preceding year, ten per centum to the policies written in the second year preceding, and five per centum to the policies written in the third year preceding, and such payments made in each of the first three calendar years in which an insurer issues compensation policies shall be distributed as follows: In the first calendar year one hundred per centum shall be charged to the policies written in that year, in the second calendar year fifty per centum shall be charged to the policies written in that year and fifty per centum to the policies written in the preceding year, in the third calendar year forty-five per centum shall be charged to the policies written in that year, forty-five per centum to the policies written

in the preceding year and ten per centum to the policies written in the second year preceding, and a schedule showing such distribution shall be included in the annual statement.

Additional reserves.—Whenever, in the judgment of the insurance commissioner, the liability or compensation loss reserves of any insurer under his supervision, calculated in accordance with the foregoing provisions, are inadequate, he may, in his discretion, require such insurer to maintain additional reserves based upon estimated individual claims or otherwise.

Schedule of experience.—Each insurer that writes liability or compensation policies shall include in the annual statement required by law a schedule of its experience thereunder in such form as the insurance commissioner may prescribe. (Amendment approved May 26, 1917; Stats. 1917, p. 1178.) [Italics Supplied.]

[HISTORY.—Amendment approved June 6, 1913, Stats. and Amdts. 1913, p. 493; amended May 26, 1917, Stats. and Amdts. 1917, p. 1178. In effect July 27, 1917.]

[EDITORIAL NOTE.—On June 6, 1913, two acts were passed amending Sec. 602a, see Stats. and Amdts. 1913, pp. 465, 493, Kerr's Cumulative Supplement to Cyc. Codes of California, 1906–1913, pp. 65–70, and "editorial" note on pp. 67, 68. From a reading of the two amendments of 1903 it is manifest that the intention of the legislature was to amend the second of the acts passed on June 6, 1913, and which in "Kerr's Cumulative Supplement" and "Kerr's Small Codes of California", is designated as Sec. 602 (a). In case of any doubt consult those works.]

U. S. GOVERNMENT PRINTING OFFICE: 1936